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In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES L. BUCKLEY, ET AL., APPELLANTS

v.

FRANCIS R. VALEO, SECRETARY OF THE SENATE, ET AL.

JAMES L. BUCKLEY, ET AL., APPELLANTS

v.

FRANCIS R. VALEO, SECRETARY OF THE SENATE, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE ATTORNEY GENERAL AS APPELLEE AND FOR THE UNITED STATES AS *AMICUS CURIAE*

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INTERESTS OF THE ATTORNEY GENERAL AND THE UNITED STATES

The Attorney General is a named defendant in this action. The Attorney General as a party, however, joins only the separate portion of this brief that addresses the problem of the scope of the Federal Election Commission's powers, which apparently trench on authority reserved to the Executive by Article II of the Constitution.[1] The Department of Justice represents the Federal Election Commission and its members, who are also parties.

The United States recognizes that this case presents difficult questions close to the core of our system of government. Whether these particular attempts to purify the electoral process can be reconciled with the First Amendment is a matter of vital interest to the United States, which has the responsibility of vindicating both concerns in light of the dual commands to "preserve, protect and defend the Constitution of the United States" and to "take care that the Laws be faithfully executed." In these circumstances, the United States will set forth its views as *amicus curiae* in the true sense of that phrase with respect to the First Amendment issues. We present and analyze the considerations and issues on all sides that, we believe, will be crucial to this Court's deliberations.

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[1] The Federal Election Commission has retained special counsel to represent it on this question.

OPINIONS BELOW

The opinion of the district court certifying the case to the court of appeals (I A. 22-35) is reported at 387 F. Supp. 135. The order of the court of appeals remanding for findings of fact (I A. 80-85) is not reported. The district court's findings of fact and recertification (II A. 1-760) are not reported. The opinions of the court of appeals *en banc* (J.S. App. 1505-1623) and the three-judge district court (J.S. No. 75-437 App. 1a-5a) are not yet reported.[2]

JURISDICTION

The judgments of the court of appeals *en banc* (J.S. App. 1624-1625) and the three-judge district court (J.S. No. 75-437 App. 1a-5a) were entered on August 15, 1975. Notices of appeal to this Court were filed on August 21, 1975 (J.S. App. 1626-1627; J.S. No. 75-437 App. 6a-7a). The jurisdiction of this Court rests upon 28 U.S.C. 1253 and 2 U.S.C. 437h(b).

QUESTIONS PRESENTED

The district court certified nine constitutional questions to the court of appeals and three-judge district court. These questions are presented here by appeal and are set forth at J.S. App. 1582-1586.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions are set out at Pl. Br. 2-4.

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[2] J.S. denotes the jurisdictional statement in No. 75-436.

The Federal Election Campaign Act Amendments of 1974, P.L. 93-443, 88 Stat. 1263; the Federal Election Campaign Act of 1971, 86 Stat. 3; and Subtitle H of the Internal Revenue Code of 1954, as amended, are set out in Volume III of the Appendix.

STATEMENT

In light of the multiple briefs being filed in this Court, we omit a separate statement of the facts and proceedings below, which are summarized in Appendix B of the opinion of the court of appeals (J.S. App. 1586-1589).

SUMMARY OF ARGUMENT

The constitutionality of the contribution and expenditure controls of FECA will be determined in large measure by the Court's choice among competing lines of cases establishing different models of review of First Amendment claims. Many cases hold that political speech is strongly protected by the First Amendment, and that this protection is not diminished simply because the speech appears as a purchased advertisement. Other cases hold, however, that political speech is subject to regulation when compelling governmental interests require such a result; the "fairness doctrine" of the Federal Communications Commission and the restrictions upon partisan political activity of civil servants are two examples of such restrictions upon political speech.

Still a third approach permits Congress to regulate activities other than communication, when the statute fulfills an important purpose unrelated to speech, the effect of the statute upon speech is incidental, and other channels of communications remain open. While none of these lines of cases is squarely controlling, analogies can be drawn to all of them. The Court's selection among them, and their application to FECA, will depend upon its assessment of the effects of FECA and the interests it is designed to serve.

The disclosure provisions of FECA should be evaluated by balancing the costs and benefits involved. Disclosure may both discourage the individual from associating with others and impede his ability to express himself vicariously through his political associations. On many occasions this Court has indicated that these are important interests protected by the First Amendment, and accordingly has held disclosure statutes unconstitutional. It has upheld disclosure statutes, however, when those statutes have been designed to secure information important to the functioning of the democratic process, and have been no more intrusive than necessary to bring that information to light. The central questions with respect to disclosure here, therefore, are whether FECA's disclosure provisions are necessary to achieve such a legislative aim, and whether that aim is sufficient to justify the effect of disclosure upon the freedom of speech and association.

There is nothing suspect in principle about the public financing provisions of FECA. Although FECA taxes some people to pay for other people's speech, such transfers of revenues are a central feature of a majoritarian democracy; taxation is the accepted method of enabling the republic to engage in projects that many people disapprove. However, because the public financing provisions touch on the ability of candidates to speak, and indirectly upon the ability of the people to cast an effective ballot for candidates of their choice, the statute must not unduly discriminate among the people and groups that are designated as the beneficiaries of the public funds. Whether FECA so discriminates depends upon whether the method the statute uses to select and offer funds to "serious" candidates adequately distinguishes the "serious" from the "frivolous" without unnecessarily favoring the established parties.

Finally, we submit that the grant of enforcement powers to the Federal Election Commission is unconstitutional. The Constitution separates the power to legislate from the power to execute the laws, granting the former to Congress and the latter to the President and Officers appointed under Article II. The Commission, however, is an arm of Congress, a legislative agency by its own admission. Most of its members are appointed by Congress, and Congress has reserved a veto power over many of its actions. Just as the executive branch cannot make the laws, so Congress (or its delegate, the Commission) cannot enforce them. The Commission's powers to seek

judicial enforcement of FECA, to promulgate some types of regulations binding upon those who enforce FECA, and to disqualify candidates for office, consequently trench upon powers reserved by Article II to the executive branch. The Commission's other powers do not, and we do not question them. Moreover, we agree with the court of appeals that most of the questions with respect to the Commission's authority are not ripe for adjudication.

ARGUMENT

This is a case of first impression and one enormously important to American political processes.[3] In an effort to help the Court with its analysis, the United States, as *amicus curiae*, will first discuss the various groupings of First Amendment cases whose rationales may be seen as competing with one

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[3] Standing alone, each of the constitutional issues presented here is of paramount importance to the future governance of the United States; with these issues combined in one lawsuit, the task of adjudication pressed upon this Court is one of enormous proportions.

The significance of these issues; their number and complexity; the vast array of prior constitutional decisions that would need to be analyzed, evaluated, distinguished or applied; the operation of the electoral process and the tradition and practices evolved in two centuries that must be assessed at every turn; the relatively abstract context in which these issues are presented for resolution and the rush to have them finally decided—all these factors raise a considerable question whether it is a proper exercise of the judicial function under Article III of the Constitution for a court to pass upon FECA now in one momentous constitutional decision. Cf. *Rescue Army* v. *Municipal Court*, 331 U.S. 549.

another for control of the issues in this case relating to campaign contributions and expenditures. We will attempt to show that no group of cases automatically governs this case, but that each offers rationales that may be thought relevant and illuminating. That done, we turn in the second half of the *amicus* presentation to a discussion of the themes and policies of the statute itself. These are quite complex and, though the statute's various provisions are interrelated, the considerations vary from topic to topic.

Because we intend this to be a true *amicus* brief, one that attempts to assist in analysis without pointing the way to particular conclusions, we shall do no more than analyze the case law and the statute. The result is intended to be a brief that supplements those of all the parties.

I. FIRST AMENDMENT CASE LAW SUGGESTS THREE ALTERNATIVE APPROACHES TO THE ISSUES HERE.

The Federal Election Campaign Act is a unique attempt to deal with the political process of the United States. Other laws have regulated incidental aspects of the political process: laws forbid corruption, vote fraud, voter intimidation; laws regulate the time and place of political speech; laws require disclosure of financial contributions to candidates. The Federal Corrupt Practices Act sets limits on candidate and committee expenditures, but the constitutionality of those provisions has never been resolved.

No other statute in our nation's history has comprehensively regulated the conduct of political campaigns for the offices of President, Senator, and Representative, reaching not only candidate activities but also the amount and method of citizen participation. Whether such a statute can be sustained will depend in large measure upon the conceptual framework within which the constitutionality of the Federal Election Campaign Act is assessed.

Three competing lines of cases express differing rationales and supply alternative frameworks for judgment. First, many cases proclaim political speech to be the core value of the First Amendment and strictly guard against interference with the political process. Second, other cases recognize governmental regulation of the amount or balance of political speech as proper when certain conditions obtain. The obvious example are cases upholding the Federal Communications Commission's regulation of broadcasting. Finally, still other cases permit regulation of conduct that takes the form of political expression when certain limiting criteria are met.

Each of these alternative frameworks or rationales has its own standards that control and limit its application. These lines of cases are by no means inconsistent with one another. Rather, they address different balances of First Amendment considerations and competing governmental interests. For that reason, we express no view about the preferable analysis, but we do attempt to isolate and state the relevant factors in order to assist the Court in its choice.

A. The General Proposition That Political Speech Is Rarely Regulable.

The line of cases denying power to inhibit political speech may be illustrated by two of them: *New York Times Co.* v. *Sullivan*, 376 U.S. 254, and *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127.

In *Sullivan* an elected city official obtained a libel judgment under Alabama law against the Times and four individuals who placed an advertisement in the newspaper inaccurately ascribing certain acts to him as the supervisor of the Montgomery police. This Court reversed the judgment on First Amendment grounds.

In an opinion by Mr. Justice Brennan, the Court rejected at the outset the contention that the constitutional guarantees of freedom of speech and of the press were inapplicable to the Times and the individual petitioners because the libelous statements were published as part of a paid, "commercial" advertisement. The Court disposed of this argument succinctly, saying the advertisement

> communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. See *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 435. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. *Smith* v. *California*, 361 U.S. 147, 150; cf. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 64, n. 6. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. Cf. *Lovell* v. *Griffin*, 303 U.S. 444, 452; *Schneider* v. *State*, 308 U.S. 147, 164. The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U.S. 1, 20. To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement. [*Sullivan, supra*, 376 U.S. at 266.]

The Court considered the damage award "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" (376 U.S. at 270). It found that the presumption of malice was inconsistent with the federal rule that "actual malice" —knowledge of falsity or reckless disregard for the truth—be shown where a public official seeks to recover for libel because of untrue criticism of his official conduct. Any less stringent rule would unduly deter public criticism of government, "the very

center of the constitutionally protected area of free expression" (376 U.S. at 292).

Sullivan indicates that political expression lies at the core of the area protected by the First Amendment.[4] The case speaks of criticism of the acts of public officials, which was what was involved there, but it cannot be supposed the Court mean to elevate criticism of political figures above countervailing praise, which is criticism of the critics, or above any expression of political ideas directly related to the operation of our governmental institutions.

The speech in *Sullivan* was not less protected because paid for and the threat to speech freedoms was perceived even though there was no prior restraint but only the deterrence of future speech by the prospect of damages for libel. But knowingly false speech amounting to libel is not part of the political expression fostered by the First Amendment and is therefore not protected.

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, the Court interpreted the Sherman Act so as not to prohibit combinations of railroads from using the political process to attack and to attempt to destroy their trucking rivals. The construction given the Sherman Act, however, was explicitly influenced by First Amendment considerations. The district court and court of

[4] See also *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272: "it can hardly be doubted that the [First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office."

appeals held for the plaintiff truckers though recognizing that mere efforts to influence legislation on the enforcement of existing laws could not be made illegal. The judgment rested upon the finding that the railroads' publicity campaign was malicious and fraudulent: its sole purpose was to destroy competitors and it deceived the public authorities because the publicity matter prepared for and paid by the railroads was disguised as the spontaneously expressed views of independent persons and civil groups.

Mr. Justice Black, writing for a unanimous Court, concluded that the judgment could not be supported even by these additional factors. Bad motives were not sufficient: "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so" (365 U.S. at 139). Nor could the judgment be supported by the plaintiffs' false attribution of views to third parties, though the technique, the Court noted, "is one which falls far short of the ethical standards generally approved in this country" (365 U.S. at 140).

Noerr stands for the proposition that attempts to prohibit political activity raise serious First Amendment problems even when the activity is "improperly" motivated and shabbily conducted. The Court interpreted the Sherman Act not to reach such speech and publication largely because of the pressure of constitutional values.

Sullivan and *Noerr* are representative of much case law of the First Amendment, a case law that shows political expression to be at the center of the unbridgeable freedom of speech, that protects paid-for political speech, that fears the deterrence caused by punishment after speech and abhors a restraint that prevents speech, and, finally, a case law that protects speech even when self-seeking and deceptive.

B. Cases Permitting Regulation Of Political Speech In The Light Of Particular Circumstances And Governmental Needs.

There are cases that permit the regulation of political speech and hence, to some as yet undefined extent, limit the thrust of the *Sullivan-Noerr* line of authority. Illustrative cases permitting regulation are *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367; and *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548. The meaning of these cases may become clearer if they are contrasted with *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, and *Mills* v. *Alabama*, 384 U.S. 214.

Red Lion dealt with the personal attack and political editorializing regulations promulgated by the Federal Communications Commission to implement its "fairness doctrine." The fairness doctrine creates a "right to reply" when a broadcaster engages in or permits personal attacks on the integrity of a person or, in an editorial, supports or opposes a candidate. Petitioner, Red Lion, supported by the broadcast media, contended that these rules under the fairness

doctrine infringed its right to freedom of expression, pointing out that the Commission's rules directly regulated speech. It asserted that the rules not only would influence the content of broadcasts, but also would deter stations from putting controversial material on the air.

The Court concluded, however, that Red Lion's predictions of the consequences of regulation were speculative and that the government is entitled to engage in such regulation of the broadcast media. The Court observed that the government, not the private station, owns the radio frequency, and, the Court went on, the government may limit the use of broadcast equipment for many of the same reasons that it may limit the use of sound-amplifying equipment. Broadcasting only one point of view may inform the public, but the information is one-sided. A station presenting certain points of view without rebuttal effectively dominates political discourse over the airwaves. In such circumstances, one man's broadcasting is another man's enforced silence.

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves.
> * * *

> By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or a fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves. [*Red Lion, supra*, 395 U.S. at 388-389].

Red Lion stands for the proposition that political speech is not inviolate; other overriding interests entitle the government to limit access to a method of communication, or to establish rules governing the discussion or presentation of certain subjects.

Letter Carriers, too, permits regulation of speech by subject matter. The Hatch Act provides that most civil servants of the federal government are forbidden to engage in partisan political campaigning. They cannot make partisan political speeches at public functions, cannot publicly support a candidate, cannot be an officer of any political organization, and cannot run in partisan campaigns for office. The speech and conduct prohibited by the Hatch Act is, as *Sullivan* pointed out, communication at the very core of the First Amendment. The Court upheld the Hatch Act, however, concluding that other interests overrode the First Amendment interest in political speech by public employees. The Court stated:

> Until now, the judgment of Congress, the Executive, and the country appears to have been that partisan political activities by federal employees must be limited if the government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences. [*Letter Carriers, supra*, 413 U.S. at 564.]

The merits and demerits of speech are ordinarily left to the marketplace of ideas. Other speakers compete in the marketplace and that competition is the public's safeguard. Although this model, which *Sullivan* accepted, pertains to most political speech, the political speech of civil servants raised special problems.

> It seems fundamental * * * that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof. A major thesis of the Hatch Act is that to serve this great end of Government—the impartial execution of the laws —it is essential that federal employees * * * not take formal positions in political campaigns,

and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government. * * *

There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent. [*Letter Carriers, supra*, 413 U.S. at 564-565.]

The interest in preserving the integrity of our governmental process is so powerful, then, that it justifies putting "off limits" to millions of civil servants the ordinary political discourse and participation that is indisputably protected by the First Amendment in other contexts. *Miami Herald Publishing Co.* v. *Tornillo, supra*, throws additional light on the rationales of *Red Lion* and *Letter Carriers*.

The newspaper business has some, though of course not all, of the characteristics of the broadcast industry. Broadcast journalism is limited by the exigencies of the radio spectrum; printed journalism is limited by the high cost of publication and delivery, and the limited supply of advertising money to keep the ventures going. In most cities there are more radio stations than newspapers and, as the Court recognized in *Tornillo*, newspaper monopolies have developed that make it difficult if not impossible for many points of view to find an effective forum. The State of Florida sought to rectify this lack of ability to communicate by a statute providing that newspapers, like the broadcast media, owed an obligation of fairness to carry replies to personal attacks during the conduct of a political campaign. The Chief Justice's opinion for the Court noted (418 U.S. at 252):

> It is argued that the "uninhibited, robust" debate is not "wide-open" but open only to a monopoly in control of the press.

But the Court concluded that (418 U.S. at 257): "Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" The Court held that the nation's commitment to full and free political debate outweighed the conclusion of the legislature that the debate in the pages of newspapers may be "unfair."

If *Tornillo* casts light on *Red Lion*, then *Mills* v. *Alabama, supra*, is usefully compared to *Letter Carriers*. The statute at issue in *Mills* provided that newspapers could not publish comments on candidates on election day. The State argued that last-minute political speech is "unfair" to candidates who may lack time to respond. The governmental interest here, like that in *Letter Carriers*, was in preserving the integrity of an important process in our system of government. The unfair influence of last-minute charges may both undermine the operation of the election mechanism and, as importantly, make the election appear to be unfair. The statute in *Mills*, like the statute in *Letter Carriers*, left broad room for debate in the marketplace of ideas; it did not affect the quality of the debate because, by hypothe-

sis, it affected speech only when it was too late for "debate," when it was too late to "expose through discussion the falsehood and fallacies" of the presentation (*Whitney* v. *California*, 274 U.S. 357, 377 (Brandeis and Holmes, JJ., concurring)). The Court unanimously held the law unconstitutional. Mr. Justice Black, writing for the Court, found the arguments in support of the statute beside the point: "no test of reasonableness" could support the statute because the First Amendment protects the right of the people to "praise or criticize governmental agents and to clamor and contend for or against change * * *. * * * It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press" (384 U.S. at 219, 220).

The *Red Lion—Letter Carriers* model allows Congress to regulate political communications, at least when the regulation does not discriminate between particular messages within the regulated area. It allows Congress to regulate communication because the communication itself is in need of regulation, either so that more diverse messages may be sent and received or so that government may perform more effectively and fairly.

C. Regulation Of Communication Incidental To Other Governmental Purposes Can Be Permissible.

United States v. *O'Brien*, 391 U.S. 367, illustrates another type of political speech regulation. It holds that government can restrict political communications incidentally, when such restrictions are necessary results of other legitimate governmental endeavors.

O'Brien, unlike *Red Lion* and *Letter Carriers*, does not permit the government to control communication for its own sake.

O'Brien dealt with a statute requiring every draft-age male to possess a Selective Service registration card and to refrain from destroying it. The Court concluded that this statute served many important purposes, none of them related to any restrictive effect upon communications: registration certificates served as proof that an individual had registered; they facilitated communication between the registrant and his local board; they reminded the registrant of his obligation under the laws; they made forgery and evasion easier to detect and punish. The Court held (391 U.S. at 377):

> we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The Court concluded that the law challenged in *O'Brien* met these tests. Congress had the power to raise and support armies, so the statute would (absent First Amendment problems) be well within its power. The statute fostered the four important governmental interests described above. These governmental interests were related to the implementation of the draft, not to the regulation of communications,

and the government was regulating the "non-speech" element of the registrant's activity—the act of burning the card. That activity did "not necessarily convey any message and hence arguably could be regulated without effectively repressing [the registrant's] ability to express himself" (*Cohen* v. *California*, 403 U.S. 15, 18). And, the Court held, the statute was the least restrictive reasonable way for the government to achieve its non-speech-related goals.[5]

D. The Three Models Of First Amendment Analysis Discussed Provide Competing Analogies For The Disposition Of The Present Litigation, But None Of Them, Without More, Automatically Decides The Constitutionality Of The Federal Election Campaign Act.

The First Amendment approaches we have outlined are offered as frameworks for the analysis of the constitutionality of the Federal Election Campaign Act and its various components. None of them is automatically dispositive since they offer only competing major premises.

The court of appeals held that *O'Brien* supplied the correct major premise and reasoned that the FECA is justified because "the Government has a clear and compelling interest in safeguarding the integrity of elections and avoiding the undue influence of wealth"

[5] Indeed, it could be persuasively argued that the conduct at issue in *O'Brien*—the burning of draft cards—had communicative value only *because* the action was illegal; it simply would not do for the offender to then turn around and assert that because his deeds expressed an idea, they could not be prohibited.

(J.S. App. 1517). There are in political campaigns, the court said, both speech and non-speech elements. Apparently the non-speech element is money, the regulation of which, under *O'Brien*, involves "incidental limitations on First Amendment freedoms" (J.S. App. 1516).

In judging whether the court of appeals' adoption of the *O'Brien* approach was appropriate, it is necessary for this Court to decide whether money in political campaigns is correctly characterized as a non-speech element. The answer depends upon the relationship of money to political speech.

Money often has a close relation to speech, as the Court recognized in *Sullivan* and reiterated last spring in *Bigelow* v. *Virginia*, No. 73-1309, decided June 16, 1975, slip op. 11-12). A conclusion that speech could be regulated because it was paid for "might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities" (*Sullivan*, *supra*, 376 U.S. at 266). A question here, therefore, is whether the FECA, by regulating money, unduly shuts off important outlets for those without access to publishing facilities. That depends upon the statute's provisions, analyzed in the next section of this brief.

This Court has dealt directly with regulation of the money that produces speech in only one case. In *Grosjean v. American Press Co.*, 297 U.S. 233, the State had levied a tax of two percent on the gross revenues of periodicals selling more than 20,000 copies

per week. The law was neutral among the topics of discussion that could appear in the taxed newspapers. It deterred large circulations only, it burdened circulation but did not prohibit it. The Court unanimously struck the law down as unconstitutional. A similar monetary burden on private speech might be open to challenge, for publication of a newspaper does not increase the protection to which a speaker is entitled (*Pell* v. *Procunier*, 417 U.S. 817; *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 850); it would follow even more clearly that prescription of a maximum sum that the newspaper could use in printing its editions would constitute a restraint on speech. See also *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 143-145 (Rutledge, J., concurring); *United States* v. *United Auto Workers*, 352 U.S. 567, 594-598 (Douglas, J., dissenting). Cf. *Deras* v. *Myers*, 535 P.2d 541, 546 (Ore.)[6] (holding unconstitutional a spending limitation upon candidates of 25 cents per voter); *Bare* v. *Gorton*, 84 Wash. 2d 380, 385-386, 526 P.2d 379, 382;[7] *Vanasco* v.

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[6] "Even personal appearances, debates, and press releases are not self-generating and if they are to constitute a substantial channel of communication, normally money must be expended to make them come about."

[7] "The defendants argue that the section merely imposes a regulation on the amount of money which can be spent in communicating. However, freedom of speech and press involve more than the bare right to speak and publish. To say otherwise is to ignore reality. To communicate effectively with the mass of voters, one * * * must use the media in one form or another."

Schwartz, E.D.N.Y., 74 Civ. 1533, decided July 14, 1975 (three-judge court).

Grosjean is not automatically dispositive here because the FECA is intended to vindicate much more profound governmental interests related to the purity of the electoral process than was the license tax involved there. Nevertheless, the case represents one vector in the analysis.

The analogy made to *O'Brien* is strengthened by the "commercial speech doctrine," allowing the regulation of certain commercial statements. Speech may be regulated under the commercial speech doctrine if it "propose[s] a commercial transaction" (*Bigelow*, *supra*, slip op. at 11-12). This analogy may be qualified or partial, however; the "commercial speech" cases often seem to turn on the content of the proposal, rather than the exchange of money. Perhaps the discriminatory advertisement in *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, could equally well have been forbidden if it had been published free of cost. Similarly, in *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, the constitutional wrong alleged was the failure to *rent* a hall for the purpose of staging a profit-making play; the Court approached the case as if the only open question was whether the content of the play justified the refusal to rent the hall. It is not absolutely clear, therefore, that the presence of money in a communication transaction is an adequate ground to invoke the *O'Brien* model.

Money sometimes can be the equivalent of speech, but on other occasions it is not. Money is also a com-

modity. It can be exchanged for goods and services other than communications; it can be abused in its own right. The commercial aspects of money are indisputably subject to regulation if they fit within the *O'Brien* model. Money used to bribe other individuals—be they bank tellers, voters or congressmen (*United States* v. *Brewster*, 408 U.S. 501)—is subject to congressional control. Money may be solicited by a candidate with improper promises of later favorable official action or threats of later unfavorable action. In these situations money is clearly a non-speech element of a campaign and there is no First Amendment objection to regulation.

Money can serve both speech and non-speech ends; this Court's selection of an approach to the First Amendment may depend, as it did in *O'Brien* itself, upon its evaluation of the reasons FECA regulates money. Some of those reasons appear to relate to the effect of money on speech. As the Court wrote in *O'Brien* (391 U.S. at 382), its case was "unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." Many if not most of the benefits attributed to FECA stem directly from its impact upon communication. Limitations on communications are the major means FECA employs to reduce the "disparity [in ability to communicate] due to wealth" (J.S. App. 1517) and contribute substantially to the Act's tendency "to equalize both the relative ability of all voters to affect electoral outcomes, and

the opportunity of all interested citizens to become candidates" (*ibid.*); only if communications are limited can "noisy" political speech be curtailed; and FECA's limitations on communications will help spare candidates the time and effort that now must be devoted to fund raising. But in *O'Brien* every one of the statute's goals (391 U.S. at 378-380) could be achieved without regard to any effect upon communication.

Some aspects of the FECA seem, therefore, to regulate money in campaigns not because money is a non-speech element but rather because money is a proxy for speech. That is to say, the amount of money contributed and spent is regulated in order to limit the amount of speech. The court of appeals recognized this and approved: "* * * the statute taken as a whole affirmatively enhances First Amendment values. By reducing in good measure disparity due to wealth, the Act tends to equalize both the relative ability of all voters to affect electoral outcomes, and the opportunity of all interested citizens to become candidates for elective federal office" (J.S. App. 1517). To this extent, both the statute and the court of appeals rely upon a *Red Lion* approach rather than *O'Brien*.[8]

In order to assess the utility of the *Red Lion* approach, it is necessary more fully to discuss the arguments in support of FECA and the effects of

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[8] Indeed, this equality theme, so prominent in FECA, suggests, as the court of appeals also recognized, the early "one man, one vote" cases, such as *Reynolds* v. *Sims*, 377 U.S. 533, and *Wesberry* v. *Sanders*, 376 U.S. 1 (see J.S. App. 1517).

its many provisions. *Red Lion* depended upon the government's special interest in the broadcast spectrum, the limited availability of that spectrum and the government's method of regulation, which gave others the chance to speak without deterring or restricting the broadcaster's speech. The *Red Lion* approach will offer support for FECA if the interests that prompted the enactment of FECA are weighty enough to call for extending that approach to the political process at large and if FECA does so by an acceptable method. Those interests here are said to be the high cost of running for office, which allows the wealthy to exercise undue influence; the possibility that money can be exchanged for political favors; the possibility that monied candidates can "monopolize" political discussion and to this extent chill political discussion; and the effect of these factors and others upon the appearance of propriety in the most critical function of a representative democracy. We now discuss in greater detail these interests and FECA's method of furthering them.

II. LIMITATIONS ON CONTRIBUTIONS AND EXPENDITURES.

A. General Considerations.

1. *Justifications.*

The court of appeals invoked several general categories of arguments supporting FECA, concluding that all of them together, if not each of them individually, demonstrated a governmental interest sufficiently pressing to satisfy the standard of review. These justifications fall into four major categories:

(a) the high and rapidly increasing cost of campaigning for public office; (b) the fact that money can be put to illegal uses or derived from illegal sources; (c) the amelioration of the advantages possessed by incumbents running for reelection; and (d) the enhancement of First Amendment values, including greater equality of opportunity to speak and run for public office. We turn to an analysis of these asserted justifications.

a. *The high cost of running for office—an overview.*

A recurring theme in the legislative history of FECA [9] and in the opinion of the court of appeals [10] is that some remedy must be devised for the high and rapidly increasing cost of waging campaigns for office.

The conclusion that campaign costs are high implies a comparison with some other state of affairs. Certainly, campaigns cost more than they once did,

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[9] See H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 3 (1974); S. Rep. No. 93-170, 93d Cong., 1st Sess. 1-2 (1973); S. Rep. No. 93-689, 93d Cong, 2d. Sess 5 (1974); S. Rep. No. 93-310, 93d Cong., 1st Sess. 1-2 (1973).

[10] As the court of appeals concluded (J.S. App. 1512-1513):

> An estimated $400 million was spent in 1972 for nomination and election campaigns—almost a 300% increase since 1952, in a period when the consumer price index rose 57.6%. In 1972, Presidential campaign spending alone totaled $94.4 million—up 67 percent from $56.4 million in 1968; up 147 percent from $38.1 million in 1964; and up 247 percent from $27.2 million in 1960. Findings IIA, ¶ 51; I, ¶¶ 39, 93, * * *.

Similar increases took place in Senate and House campaign costs. Findings IIA, ¶¶ 5-11 (II A. 326-441).

and that is only partly accounted for by inflation, but it is unclear that that fact, standing alone, has significance of constitutional dimensions.[11] The cost of election campaigns in 1972 was approximately $400 million for all candidates for all federal offices, or a little less than $2 for each citizen or $4 for each person of voting age. This sum may not, in the abstract, appear excessive for providing to voters information that enables them to perform one of the most important acts entrusted to them as citizens—choosing the representatives who will make decisions regarding federal laws and the federal budget.

Even if these sums were in fact too high by some relative measurement, it is still difficult to see why this, standing alone, would be a satisfactory ground upon which to predicate expenditure limitations. Congress presumably could not order publishers to lower their prices because it thought that books and newspapers had become "too expensive" for purchase by people of modest means. But if "high" price is not *by itself* a ground for such regulation, one must ask more specifically what is wrong with high prices.

In the case of political campaigns high costs may produce three more specific types of problems: (i) the opportunity for the wealthy, or special interest groups, to "purchase" a point of view; (ii) the consumption of the time of candidates in fund raising,

[11] Today's higher cost of running for office may result, for example, from the adoption of modern techniques (such as mass mail campaigns for contributions) so that candidates are reaching (and raising money from) more potential voters than ever before.

which prevents them from engaging in other campaign activities; (iii) the "noisy" communications produced by expensive campaigns may drown out other candidates or annoy those who hear them. We analyze each of these possibilities in turn.

(i) High costs allow the wealthy and special interest groups to exercise undue influence.

The court of appeals accurately pointed out that contributions from relatively well-to-do individuals, and from groups promoting their own interest, make up a substantial part of all contributions to political campaigns.[12] The concern is with having our political process under the control of those who put up the money and receive support in return. The question is whether this concern justifies restrictions upon freedom of speech.

It is important to recognize, first, that this concern

[12] During the 1974 campaigns approximately one percent of the people contributed approximately 90 percent of all campaign funds (Findings I, ¶ 10; II A. 54). Many contributions flow from groups, such as labor, business, agriculture and health associations, that are anxious to promote interests that they may not share in common with the public at large. These groups gave substantial sums to the 1974 congressional campaigns: labor groups donated $4.3 million, business groups $1.6 million, health groups $1.5 million, and agricultural groups $182,000 (Findings IIA, ¶¶ 96-97, 99; II A. 464-465). These contributions were lawful under existing law. (We discuss at pages 43-45, *infra*, the arguments concerning unlawful contributions.) Moreover, during the same contests 120 registered interest groups, on 278 occasions, donated sums aggregating $676,897 to two or more opposing candidates running for the same office, so that the interest group would have contributed to the victor, whomever that should turn out to be (Findings IIA, ¶ 104; II A. 467).

is relevant only to restrictions upon sums contributed; unless an expenditure ceiling is necessary to enforce the prohibition against disguised or surreptitious contributions, this justification does not support Congress' decision that candidates cannot *expend* sums received from small or "disinterested" donors. Moreover, it may often be difficult to discern whether substantial contributors donate in order to secure allegiance from candidates, or the donations follow candidate views articulated independently of the prospect for particular donations. Money of course can serve any cause and candidates may announce positions and then await support from those who agree. The fund-raising successes of diverse candidates suggest that money will be forthcoming to most serious candidates who take strong stands, no matter how different his views from those of the established order. If this is so, then, in such instances at least, the donors are the instruments of the candidates, rather than the reverse.

To a substantial extent, this "interest group" justification for FECA depends upon a belief that the wealthy and the parochial interest groups are too powerful, and that if candidates espouse the point of view of these contributors because of their contributions the result will be deleterious.[13] The viewpoint of such contributors will prevail not because it is more persuasive but because it has the most money behind it.

This worry is legitimate but *Thomas* v. *Collins*, 323 U.S. 516, cautions that this rationale may not be

[13] See also the discussion at pages 51-58, *infra*, concerning the augmentation of First Amendment values.

extended indefinitely. The State in that case had forbidden union organizers to speak unless they had obtained "organizers' cards;" it claimed that this statute was necessary to protect its citizens against organizers who had been "bought" by special interests and who would deceive the workers. The Court held the justification insufficient in spite of this "rational connection between the remedy provided and the evil to be curbed" (323 U.S. at 530), concluding that when the union organizer was engaged in no more than advocacy of legitimate goals, the source of his support did not justify State regulation (*id.* at 535-537).[14]

To the extent this justification for FECA rests upon the belief that the views of the wealthy and self-interested groups are overrepresented, it is subject to the counterargument that the First Amendment protects the promulgation of bloc views—even when those views are demonstrably antagonistic to the public welfare. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, suggests that special interest groups, no less than other potential speakers, are entitled to achieve such influence as they can through communicative devices. An expensive publicity campaign to influence the government, the Court stated, "falls clearly into the category of political activity" (365 U.S. at 140-141)

[14] *Bigelow* v. *Virginia, supra,* is to much the same effect, for the Court held that advertisements, even if "inimical to the public interest," can be published without regard to the source of the funds that paid for them (slip op. at 17).

protected by the First Amendment.[15] *Noerr*, however, is not dispositive here because it ultimately turned on a question of statutory construction, though that construction appears to have been influenced by First Amendment values, and did not involve campaign contributions.

One must consider as well that, in at least some respects, the role of the special interest groups may be desirable in our pluralist society.[16] In regard to

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[15] "Indeed, it is quite probably people with * * * a hope of personal advantage who provide much of the information upon which governments must act" (*id.* at 139).

[16] [The] asserted beneficial tendency of restrictions upon expenditures for publicizing political views, whether of a group or of an individual, is certainly counterbalanced to some extent by the loss of democratic processes resulting from the restrictions upon free and full public discussion. The claimed evil is not one unmixed with good.
* * *

The expression of bloc sentiment is and always has been an integral part of our democratic electoral and legislative processes. They could hardly go on without it.
* * *

There is therefore an effect in restricting expenditures for the publicizing of political views not inherently present in restricting other types of expenditure, namely, that it necessarily deprives the electorate, the persons entitled to hear, as well as the author of the utterance, whether an individual or a group, of the advantage of free and full discussion and of the right of free assembly for that purpose.

The most complete exercise of those rights is essential to the full, fair and untrammeled operation of the electoral process. * * *

For "undue influence" in this connection may represent no more than convincing weight of argument fully presented, which is the very thing the Amendment and the electoral process it protects were intended to bring

political campaigns, there is in any event the opportunity for the middle class, and even the poor, to pool resources to speak collectively in a more effective manner; many major campaigns in recent years have been financed almost entirely through small contributions. The expenditure limits of FECA apply to expenditures financed by small contributions no less than to expenditures financed by large contributions, however, and so FECA might, in some circumstances, prevent large numbers of people from banding together to communicate more effectively than do small numbers of wealthy people or organizations.

Finally, we observe that, even to the extent FECA is properly directed at the decrease of the role of money as a tool of interest-group expression in political campaigns, it is limited. Contributions and expenditures by corporations and labor groups are exempted from the spending and contribution controls to the extent they are not regulated by 18 U.S.C. 610, the Federal Corrupt Practices Act. FECA thus permits corporate or union contributions,[17] which almost by definition would be "special

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out. And one may question how far legislators may go in accurately assessing undue or disproportionate weight as distinguished from making substantially accurate findings and conclusions concerning corruption. [*United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 143, 144, 145 (Rutledge, J., concurring).]

[17] Section 610 permits labor unions and corporations to establish political action funds as long as they assemble such funds from "voluntary" contributions. Once the funds are established, they can be operated as a integral unit of the larger enterprise. *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385.

interest" money, while it forbids contributions by voluntary associations and individuals. It is therefore conceivable that the net effect of FECA will be to increase rather than decrease the perceived disproportionate role of special interest contributions. This observation, however, may not have constitutional significance since Congress is not usually required to deal with all of a problem it addresses.

(ii) Fund raising consumes candidate time that otherwise would be devoted to campaigning.

The court of appeals found support for the statute in the fact that in order to raise large amounts of money to support a campaign, "candidates [are] compelled to allot to fund raising increasing and extreme amounts of time and energy" (J.S. App. 1513). A past finance chairman of the Democratic National Committee testified that a presidential candidate is required to spend 70 percent of his time in pursuit of funds.[18]

There is, of course, another side to this problem. If the idea is that expenditure limits relieve the pressure of raising funds, thereby giving the candidate more time to engage in speaking, there may be effective alternative means of accomplishing this end. For example, public financing of election campaigns, quite independent of restrictions upon contributions and expenditures, will provide some relief.

[18] Testimony of Joseph Cole, in Hearings on H.R. 7612 and S. 372 Before the Subcommittee on Elections of the House Committee on House Administration, 93d Cong., 1st Sess. 138 (1973).

A restriction on contributions will increase this effect even without an accompanying restriction on expenditures; once candidates are precluded from drawing upon wealthy donors who command personal attention, campaign fund raising may turn more to direct mail efforts that are sparing of the candidate's time.[19]

(iii) Campaigns with large budgets tend to be "noisy" and can drown out other candidates and annoy voters.

It may be argued in support of FECA that excessive campaign spending is simply excess noise. It enables some candidates to "drown out" others by outspending them and at the same time be so intrusive as to annoy the voters, who are compelled to listen.[20]

[19] On the other hand, it could be argued that although FECA enables a candidate to use a greater proportion of his campaigning time for "actual" campaigning, it also compels candidates to start campaigning earlier than ever before. Because large contributions cannot be accepted, the candidates' major source of funds will be smaller donations that take long periods of time to accumulate. See *The New York Times*, July 21, 1975, p. 10, col. 3. Candidates are compelled to declare their candidacy at earlier dates in order to commence these lengthy fund-raising efforts; the earlier declarations and campaigning may be to the detriment of their other duties.

[20] See Freund, *Commentary*, in Rosenthal, *Federal Regulation of Campaign Finance: Some Constitutional Questions* 71 (1971):

> The right to speak is, I submit, more central to the values envisaged by the First Amendment than the right to spend. We are dealing here not so much with the right to personal expression or even association, but with dollars and decibels. And just as the volume of sound may be limited by law, so the volume of dollars may be limited, without violating the First Amendment.

Because FECA is neutral on its face among the things candidates can say, it does not prevent an idea from being expressed but simply sets a limit on how many people can express it, how often, and how loudly. As Professor Meikeljohn put it (Meikeljohn, *Political Freedom* 26 (1948)): "What is essential is not that everyone shall speak, but that everything worth saying shall be said."

However, the "noisy" communications are not raucous, as was the loudspeaker in *Kovacs* v. *Cooper*, 336 U.S. 77. An analogy to *Kovacs* might rest upon an argument that the people have a right not to be annoyed by "excessive" costly communication, but FECA differentiates among speakers and according to subject matter. For example, newspaper and broadcast media are exempt from expenditure limitations, so they can engage in the excessive or intrusive political expression that FECA forbids when engaged in by candidates; as to content, FECA deals with only one kind of speech—political speech—by regulating the amount of money devoted to it in campaigns. This Court repeatedly has held, though in other contexts than this, that discrimination among speakers and according to content of speech is impermissible. See, *e.g.*, *Erznoznik* v. *City of Jacksonville*, No. 73-1942, decided June 23, 1975; *Police Department of Chicago* v. *Mosley*, 408 U.S. 92.

Content and speaker differentiations aside, there may be a problem with the assertion that political speech during campaigns has reached an offensively loud level, since the amount of political communica-

tion even then is dwarfed by the bulk of commercial advertisements that fill the airwaves and newspapers, and by the television and radio programs, and newspaper stories and columns these advertisements support. It may be that a necessary foundation for upholding the law on this particular theory is that voters are in fact being annoyed by current campaign communication.

Finally, as *Erznoznik* makes clear, *Kovacs* means no more than that "captive audiences" cannot be thrust upon. See *Terminiello* v. *Chicago*, 337 U.S. 1; *Gregory* v. *Chicago*, 394 U.S. 111; *Mosley, supra; Cohen, supra.* The audiences for political speech are not entirely captive; they are free to turn the page, switch channels, and stay home rather than attend speeches and rallies.

The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes." *Rowan v. Post Office Dept.*, 397 U.S. [728] at 736. Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Cohen* v. *California*, 403 U.S. at 21. See also *Spence* v. *Washington*, 418 U.S. 405, 412 (1974).

Erznoznik, supra, slip op. at 5-6 (footnote omitted). Congress usually does not have the option of foreclosing the rights of willing listeners simply because some individuals will be offended before they have an opportunity to turn their attention elsewhere.[21] But it is also true that laws may exclude even political speech from certain areas where it would annoy persons, and, to this degree, the rationale under examination may be supported by the cases permitting regulation of the times, places, and manner of speech.

The second branch of the analogy to *Kovacs*—that large quantities of speech by a monied candidate "drown out," or at least make ineffective, the speech of his opponent—seems weak. There is no basis in the record for concluding that this case presents an "outshouting" problem, in which the clamor of one candidate makes it difficult to hear other candidates. There is not the slightest hint that if Candidate A buys space in a newspaper or time on television, Candidate B will be shut out; most likely, both will be accommodated, or some commercial advertiser displaced.[22] Nor is there any reason to believe that politicians now command "excessive" amounts of communications space; the contrary may well be true.

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[21] Cf. Stone, *Fora Americana: Speech in Public Places,* 1974 Sup. Ct. Rev. 233, 262-263; Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana,* 1965 Sup. Ct. Rev. 1.

[22] The total spending limit for a Presidential campaign is $20,000,000, and for a senatorial campaign 12 cents per voter—in either case barely enough to send one first class letter to each voter and considerably less than the advertising budgets of large corporations.

In politics "volume" of communication may be essential because candidates are competing not only against each other but against every other form of communication.

(iv) Preserving the appearance of propriety and freedom from influence—the analogy to *Letter Carriers.*

The court of appeals concluded (J.S. App. 1517) that

> The Constitution * * * takes account of the governmental interest in curbing the *appearance* of undue influence, in order to avoid the corrosion of public confidence that is indispensable to democratic survival. In *Civil Service Commission* v. *Letter Carriers,* 413 U.S. 548, 565 (1973), Justice White articulated this:
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> > [I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

The argument continues that even direct limitations on political expression are permissible when necessary to protect the integrity of elections. There is plainly a compelling governmental interest in preventing government from coming under such a cloud of suspicion of undue influence that it no longer commands the respect of the people.

Though the thrust of *Letter Carriers* and its com-

panion case, *Broadrick* v. *Oklahoma*, 413 U.S. 601, the only two cases discussing the First Amendment implications of similar statutes, supports FECA, it is arguable whether they provide compelling support for the contribution or expenditure limits of FECA. *Broadrick* stated (413 U.S. at 616) that civil servants can be subjected to restrictions upon speech that "if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments."

It might be thought that there are important differences and similarities between civil servants and the public at large, and between civil servants and candidates, that call for a difference in treatment. Civil servants, as contrasted to the public at large, are self-selected and can recapture full political freedom by resigning; those who are not civil servants retain full rights of speech and assembly, so that restrictions upon civil servants do not affect the entire system of freedom of expression. FECA, by contrast, affects all individuals alike, and no individual desiring greater freedom to express himself can gain that freedom.

More important, however, the reason for the restrictions imposed by the Hatch Act is that civil servants must both do, and seem to do, justice according to the statutes they administer; there is no role for political considerations in the day-to-day functioning of government, and the involvement of civil servants in politics would jeopardize their role as impartial intermediators between the citizen and our laws.

But there is a similar concern with respect to candidates for public office; members of Congress make the laws, and should not perform (or seem to perform) this task in exchange for monetary contributions.

There are, of course, differences between civil servants and politicians that are relevant here. While a desire to "take civil servants out of politics" is readily understandable, there could be no parallel desire, at least under democratic government as we know it, to "take politicians out of politics." Members of Congress, and the President, make the policy civil servants must apply, and the policy-makers legitimately can be sensitive to "political" considerations including the needs and desires of "pressure groups."

b. ***Campaign money can be put to illegal uses or derived from forbidden sources.***

During the 1972 presidential campaign there occurred a large number of abuses which are among the occurrences now collectively referred to as "Watergate." As the court of appeals wrote (J.S. App. 1515-1516; footnotes omitted): "Revelations of huge contributions from the dairy industry, a number of corporations (illegally) and ambassadors and potential ambassadors, made the 1972 election a watershed for public confidence in the electoral system. * * * After extensive investigation, Congress concluded that such corrupt and pernicious practices are more likely to occur when there are no effective limits on amount of campaign expenditure."

The Supreme Court of Oregon responded to a simi-

lar argument in favor of state campaign expenditure limits: [23]

> We fail to see how these evils [of Watergate] are relevant * * * . The "break-in," the bribery, the "wiretap," the use of government servants for private political ends, the "cover-up," the various "dirty tricks," and the other moral and legal deviations characterizing "Watergate" had little or nothing to do with the fact that large sums of money were available to a political party.

In regard to bribery, however, it is not so easy to dismiss this justification for FECA's contribution and expenditure limits. A "bribe" may take the form of a sum of money exchanged in return for the promise of favorable treatment or to avoid the prospect of unfavorable treatment. Such promises can be implied as well as express; such prospects can be imagined as well as real. As a result much money will change hands for reasons that border on, or appear to be, bribery, but are not; much real bribery will not be provable in a court of law. It is exceptionally hard to detect exchanges of money for action. An alternative open to Congress is thus to reduce the candidate's incentive to seek and accept large contributions, which can be accomplished by setting limits on the expenditures of each candidate. Perhaps expenditures can be monitored more effectively than contribu-

[23] *Deras* v. *Myers*, 535 P.2d 541, 546 (Ore.) (note omitted). The Oregon court suggested that the State legislature draft a statute directed to these morally wrong acts but not sweeping within its prohibitions many unobjectionable communicative endeavors.

tions; even if candidates and donors attempt to avoid the law by failing to report a contribution, the money it represents might be detected as "outgo" during the campaign. Once expenditure ceilings are established, candidates often will be able to secure their legal limit of funds without being required to rely upon the large contributions that are, or reasonably may be confused with, money exchanged for votes.

The court of appeals thus concluded that the need to avoid the receipt of funds from illegal sources or for illegal reasons was strong support for a limitation upon expenditures in view of:

> the compelling government interest in preserving the integrity of the system of elections through which citizens exercise the core right of a free democracy of selecting the officials who will make and execute the laws under which we all must live. [J.S. App. 1511; footnote omitted.]

The questions remaining in this regard are one of degree: is this justification so pressing that it permits substantial restrictions on the rights of political activity? Could it be redressed by some less restrictive means or, perhaps, is it an evil that we are compelled to suffer without redress, lest the cure be worse than the disease?

c. *Reduction of the advantages enjoyed by incumbents.*

It is argued that the contribution and expenditure limits of FECA will reduce the advantage enjoyed by incumbents because they no longer will be able to enjoy the increased publicity and staff that

superior financing can provide. The contrary argument is that FECA will increase the advantages incumbents already enjoy because challengers no longer will be able to outspend incumbents and because incumbents enjoy certain advantages not valued by FECA or included within its ceilings. These conflicting approaches and "speculative * * * assertions," the court of appeals found (J.S. App. 1540-1541), are not satisfactory arguments either for or against the constitutionality of the statute.

In order to demonstrate why this is so, we begin with four indisputable facts. First, incumbents have significant advantages over most challengers. Incumbents have name recognition, a factor of real importance in many if not most races; challengers rarely approach incumbents in this factor until well into the campaign, unless the challenger holds some other public office. Incumbents have a performance record on issues that are likely to recur; this record attracts both volunteer help and contributions from those who desire to keep a man of such views in a position of power. Because the incumbent is charged by his office with making political decisions, he usually has access to unpaid coverage in the printed and broadcast media in which to explain his performance in office; challengers have no similar forum. And, of course, incumbents have the frank and a large staff drawing salaries from the public treasury; these and other resources can be put to good use long before the formal campaign begins. A recent study by Americans for Democratic Action set a value of

$488,000 per member of Congress per year on the accoutrements of office provided with public money (although this figure is on the high side).[24]

The second consideration, however, is that these advantages are accompanied by disadvantages. Incumbents also acquire political debts to be paid, and the stands they take on public issues, while pleasing to some constituents, will be anathema to others. An incumbent has ample opportunities to "make enemies" and so create support for the challenger in his next election campaign. For any given member of Congress the disadvantages of incumbency may outweigh the advantages; it seems safe to say, however, in light of the fact that most incumbents are re-

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[24] Americans for Democratic Action, *ADA Special Report: Advantages of an Incumbent Seeking Re-election* (August 25, 1975). Compare this figure with $70,000, the maximum allowable expenditure in both primary and general elections for any candidate for the House in a State with more than one representative (18 U.S.C. 608(c)(1)(C) and (D)). See also II A. 16-21.

The ADA figure is, however, considerably overstated. It includes many items (such as rental value of an incumbent's Washington offices) that produce no electoral benefit and which a challenger would not seek to duplicate. The same can be said for a drapery allowance and the cost of air fare between Washington and the home district (the challenger will, presumably, be in the district throughout). However, benefits such as office space in the member's district ($7,200); franking, stationery and newsletter allowance ($95,928); part of the value of staff services ($227,200); congressional television recording studios, research and speech writing services (no value assigned); and other services and benefits are of indisputable aid to an incumbent. See also Note, *Congressional Requisites and Fair Elections: The Case of the Franking Privilege*, 83 Yale L.J. 1055 (1974).

elected, that the advantages of incumbency usually outweigh the disadvantages.[25]

The third fact is that incumbents who prevail almost always spend more than their challengers (see J.S. App. 1540, n. 105). But, fourth, in cases in which challengers outspend incumbents, the challengers' chances of prevailing dramatically increase. Incumbents faced challengers in 323 House races in 1974 (II A. 442). Challengers outspent incumbents in 71 of these races (II A. 443). Only 40 challengers defeated incumbents (*ibid.*), but of the 71 races in which challengers outspent incumbents, 22 challengers prevailed (*ibid.*). It is not difficult to see that the challenger who was able to outspend the incumbent was significantly more likely to prevail than the challenger who could not,[26] but it is exceeding difficult to know what produces these effects.[27]

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[25] There are, of course, a large number of "safe" districts in which the party adherence of the voters is so out of balance that only one party has a realistic opportunity to prevail at the general election. In that event the advantages and disadvantages of incumbency are relevant only during the primary of the party with the greater support in the district.

[26] These figures include the races in one-party districts in which the challengers had no reasonable prospect of success. In almost all of these districts the incumbents outspent the challengers. The data in the text therefore overstates the challengers' gain from outspending an incumbent: it would be more useful to be able to examine the effects of spending only in the districts that have some history of electing representatives from a party other than the party of the incumbent.

[27] But see Campbell, Converse, Miller & Stokes, *The American Voter* (1960); Lazarsfeld, Berelson & Gaudet, *The*

Even if one assumes that the communications with the voters that money can facilitate are important in persuading them to vote for the candidate, it would be necessary to assess the marginal effect of each dollar's worth of communication. An incumbent may be so well known, or so widely disliked, that $1000 worth of communication by him could change only 10 votes; the voter has already received so many communications from or about an incumbent that one additional communication is unlikely to add to his knowledge about the incumbent and consequently unlikely to af-

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People's Choice (1944); Key, *Politics, Parties & Pressure Groups* (1958); Converse, Clausen & Miller, *Electoral Myth and Reality: The 1964 Election*, 59 Am. Pol. Sci. Rev. 321 (1965); Alford, *The Role of Social Class in American Voting Behavior*, 16 W. Pol. Q. 180 (1963). See the summary of voting studies in Lipset, *Political Man* chs. 7-9 (1960). The studies suggest that voting behavior can be predicted with a high degree of precision from sociometric data and attitudinal surveys, quite independent of candidate expenditures.

It is possible, moreover, that money is an effect rather than cause. Perhaps "popular" views, good volunteer organization, an unpopular incumbent, and so on, both ensure victory and attract money. That is, the candidate who attracts the most money may be the candidate who had the support needed to prevail at the polls anyway, and that underlying support simply expresses itself in different ways: more volunteers, more money, and more votes. This could explain why "winners" as a class seem to outspend "losers" as a class, whether the winners be incumbent or challengers—winners have more of everything, and depriving them of more money will not change things. Perhaps this hypothesis is true for some candidates and false for others; perhaps it is false for all. Our political science knowledge is simply insufficient to enable us to know the answer. Cf. Kallper, *The Effects of Mass Communication* (1960); Key, *Public Opinion and American Democracy* (1961).

fect his vote. But the voter is less familiar with the challenger, and so more likely to be affected by the challenger's communications. Perhaps $1,000 worth of communications by a challenger can change 100 votes and, as well, help the challenger frame the issues and influence policy even if he is not elected. This is nothing more than the law of diminishing returns applied to the political arena; a unit of speech is more potent for a newcomer than for one who has been speaking for a long time. If this is correct, then equality of campaign budget ceilings does not produce equality of results. The marginal dollars the challenger is prohibited from spending would have been worth far more in votes to the challenger than the marginal dollars the incumbent is prevented from spending would have been worth to him.[28] Equality of budget ceilings is then not equality of ability to influence the electorate.

We add, once more, that it is not known whether the foregoing accurately describes the actual inter-

[28] The net effect can be assessed only by multiplying the marginal "vote value" of each dollar in the relevant range by the number of dollars of spending curtailed. If incumbents regularly have spent more than the ceiling now imposed by FECA, while challengers have spent less, the effect on incumbents would be greater. (For example, if a marginal $1,000 is worth 100 votes to a challenger and 50 votes to an incumbent, and if the expenditure ceiling causes an incumbent to spend $30,000 less than he could raise while limiting the challenger to only $10,000 less than he could raise, the incumbent will "lose" 1,500 votes and the challenger 1,000, a net benefit of 500 to the challenger in spite of his higher marginal return per dollar of communication.)

play of forces in a political campaign. The very lack of knowledge—and the possibility, not yet disproven, that FECA is destructive of the interest in equality that is advanced in its behalf—cautions against attributing too much weight to arguments of this sort. As the court below recognized, the contention that FECA will ameliorate the advantages of incumbency is not an argument that lends support to a statute impinging on speech.

d. *Enhancement of First Amendment Values.*

The court of appeals concluded that FECA's effect upon freedom of speech is offset by its contribution to First Amendment values. It wrote (J.S. App. 1517):

> It would be strange indeed if, by extrapolation outward from the basic rights of individuals, the wealthy few could claim a constitutional guarantee to a stronger political voice than the unwealthy many because they are able to give and spend more money * * * .
>
> * * * * *
>
> There is a positive offset to plaintiffs' invocation of the First Amendment in the presentation by intervening defendants that the statute taken as a whole affirmatively enhances First Amendment values. By reducing in good measure disparity due to wealth, the Act tends to equalize both the relative ability of all voters to affect electoral outcomes, and the opportunity of all interested citizens to become candidates for elective federal office. This broadens the choice of candidates and the opportunity to hear variety [*sic*] of views.

We now discuss, in turn, the companion arguments that the contribution and expenditure limits of FECA will provide citizens with a more equal voice in political affairs and a more nearly equal opportunity to run for office.

(i) A more nearly equal opportunity to express political opinions.

According to Professor Emerson, "[t]he most challenging problems in First Amendment theory today lie in the prospect of using law affirmatively to promote more effective functioning of the system of freedom of expression." [29] He argued that "the government must affirmatively make available the opportunity for expression as well as protect it from encroachment" in order to ensure "the ability to speak despite economic or other barriers.' [30] "[T]he tests must be framed in terms of accommodation of interests within the system, nondiscrimination, promotion rather than deterrence of expression, and the like." [31]

By placing a limitation upon the contributions and expenditures of those who can afford sums exceeding the statutory maxima, FECA makes people more nearly equal in the ability to express themselves.[32]

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[29] Emerson, *The System of Freedom of Expression* 627 (1970).

[30] *Id.* at 629.

[31] *Ibid.*; footnote omitted.

[32] A closely related argument is that if additional spending leads to additional votes for a candidate, then a person (candidate or supporter) with more money can have a greater effect on the election, just as if he could himself cast more votes than other people. Casting multiple votes is clearly illegitimate and inconsistent with the idea of one man, one vote. Compare Nicholson, *Campaign Financing and Equal Protection*, 26 Stan. L. Rev. 815, 819-820 (1974) and Rawls, *A Theory of Justice* 225-228 (1971), with Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C. L. Rev. 389, 459-465 (1973) and Nozick, *Anarchy, State, and Utopia* 150-153, 204-216 (1974).

But this argument is incomplete unless its proponent explains how additional spending yields additional votes; presumably dollars are not stuffed in the ballot boxes. In most versions of the argument, the mediating factor that turns money into votes is speech. More money leads to more communications supporting the candidate. More communications supporting the candidate leads to additional votes. Now the argument is squarely that "more speech" must be forbidden, because it yields more votes. There may be some tension here with principles long accepted by this Court. Speech cannot be forbidden simply because, in the long run, it may lead to action; advocacy cannot be proscribed simply because it may be effective. See *Brandenburg* v. *Ohio*, 395 U.S. 444; *Noerr*, *supra*; *United States* v. *Congress of Industrial Organizations*, *supra*, 335 U.S. at 145 (Rutledge, J., concurring) (" '[U]ndue influence' in this connection may represent no more than convincing weight of argument fully presented, which is the very thing the Amendment and the electoral process it protects were intended to bring out."); *Thomas* v. *Collins*, *supra*, 323 U.S. at 537 ("The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts.").

By so doing, it may well encourage those who previously had thought their voice "too small" to have an impact to speak up. If this happens, the diversity of views presented may well increase and listeners

and readers may be presented with a broader menu of communications from which to choose.

Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367, supports this argument by analogy; just as the "fairness doctrine" of *Red Lion* augments the First Amendment rights of the many to speak and to hear diverse views over the public airwaves, so FECA augments the First Amendment rights of the many to speak and hear more diverse views; candidates and their views will receive more nearly equal exposure, to the benefit to all. Cf. *Associated Press* v. *United States*, 326 U.S. 1, 20.

The question then becomes whether *Red Lion* was intended to be the exception or the model for political communications. Its holding was predicated not only upon the assumption that the public owns the airwaves but also upon the assumption that there is such a shortage of broadcast space that a decision by a station to broadcast one point of view could shut out other points of view. The issue becomes whether that situation, or one sufficiently similar, obtains outside the broadcast industry. Is there evidence or reason to believe that speech by one political faction will preclude response by others? Of course, another assumption underlying FECA is that when one faction speaks, reply by another occurs and costs money, leading to an upward spiral of campaign costs. This upward spiral, provoked by an ever-increasing amount of political speech, is a problem quite outside the *Red Lion* fairness doctrine.

It should be recognized that the "enhancing" of First Amendment values through contribution and expenditure limitations comes about by silencing those who now speak more, not by enabling those who do not now speak to speak more in the future. The government may not be constitutionally compelled to enhance the opportunity for speech, see *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, but when it acts toward this end the question is whether it must do so by augmenting the opportunities for speech by those who are now relatively silent, rather than by "leveling" those who now propagate the most speech.

The argument for enhanced First Amendment values, as applied to the contribution and expenditure restrictions of FECA, may be that some individuals must surrender their rights to speak so that others will have a greater share of the fewer "speech rights" that remain. But this entails the troubling proposition that "uninhibited, robust, and wide-open" debate (*New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 270) is sometimes to be avoided. Mr. Justice Stewart remarked, concurring in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 133, that if such an argument based on First Amendment values is accepted, "[f]reedom of the press would then be gone. In its place we would have such governmental controls upon the press as a majority of this Court at any particular moment might consider First Amendment 'values' to require. It is a frightening specter." The First Amendment forbids government to cut off one person's speech on

the ground that he has had "enough" of that good, or that "enough" has been heard of his views (*id.* at 143).

In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, a unanimous Court declined to apply the *Red Lion* doctrine outside the broadcast media. The Court's opinion in *Tornillo* began with a lengthy recitation of the goals that might be served by a right to reply statute: the Court accepted the propositions that there was a media monopoly in the Miami area, that the media prevented access by candidates who "needed" access, that journalists have become advocates rather than observers, that candidates were not equally able to speak, and so on. The list of social ills redressed by the right to reply statute in *Tornillo* is similar to some of the perceived ills addressed by FECA. But *Tornillo*, relying upon *Sullivan*, concluded that all of those reasons together do not furnish grounds to fetter political speech, because "under the operation of the * * * statute, political and electoral coverage would be blunted or reduced" (418 U.S. at 257; footnote omitted).

It was of course the choice of the paper's editor in *Tornillo* what and how much he would or would not say in his paper; but it likewise has been the choice of the candidate what and how much he will say in his campaign, and it has been the choice of the citizen what and how much he will say either directly or vicariously in a political campaign.[33]

[33] *Tornillo* cannot be distinguished on the ground that it dealt with the freedom of the press, which has been preserved

While facilitating the right of individuals to speak and to communicate their views to others is a goal Congress can pursue (and justifies in part the public financing provisions of FECA), it must be decided whether Congress may foster this end by inhibiting (or prohibiting) the speech of those who now speak, rather than by increasing the opportunities open to those who need assistance.[34]

(ii) A more nearly equal opportunity to become a candidate.

The conclusion of the court of appeals that the contribution and expenditure limits of FECA promote "the opportunity of all interested citizens to become

by FECA (18 U.S.C. 591(f)(4)(A)), rather than with the speech of natural individuals such as candidates. An individual's freedom is not enhanced by ownership of a printing press; the freedom of the press secured by the First Amendment is basically the freedom of the press to enjoy the freedom of speech secured to individuals. *Pell* v. *Procunier, supra*, 417 U.S. at 832-835; *Saxbe* v. *Washington Post Co., supra.*

[34] There is also an argument, albeit an essentially empirical one, that the contribution and expenditure limitations of FECA will not equalize political opportunities but simply shift the locus of inequality. Candidates and potential speakers have unequal access to volunteer support, unequal opportunity to benefit from "issue" groups that engage in publicity designed to increase the salience of an issue on which the candidate may have a well-known position, and unequal access to other nonmonetary sources of potential support. The total inequality may be the same after FECA as before; those who would seek to foster inequality simply must use different resources. And, of course, all of these forms of support can be exchanged for the candidate's promises, express or implied, of favorable treatment.

candidates" (J.S. App. 1517) is open to similar analysis. Surely equal opportunity to run for public office is to be assiduously fostered. And, as surely, government cannot, except in furtherance of some compelling interest, limit a candidate's access to a position on the ballot. See *Lubin* v. *Panish*, 415 U.S. 709; *Storer* v. *Brown*, 415 U.S. 724. There is also a compelling constitutional mandate that all votes shall be of equal weight. *Reynolds* v. *Sims*, 377 U.S. 533. Although government may not be permitted to diminish or hinder access to the ballot by erecting unduly high barriers such as filing fees, it may not necessarily follow that government may be allowed to foster equality by removing the advantages—such as speech—of the better-endowed candidates and their supporters.

2. *Arguments against the contribution and expenditure limitations.*

The arguments against the contribution and expenditure limits of FECA have, by and large, been canvassed in the sections of this brief analyzing the possible governmental interests justifying the restrictions (pages 22-57, *supra*). In the main, the contention is that because FECA establishes restrictions upon speech, it cannot survive—an argument that must be qualified by the observation that some governmental interests are so compelling that they support suitably narrow restrictions. It may be that it is not enough that "some" speech is left untouched by FECA, but that is true only if the speech that

FECA affects is itself shielded against regulation by the First Amendment.

The heart of the argument against the statute is that the bad effects of some political activity cannot be cauterized by restraining all political speech; the First Amendment has its most urgent application to political advocacy, and FECA is directed "narrowly" to that very core of the Amendment's protections.[35] We have discussed above the arguments derived from *New York Times Co.* v. *Sullivan* (pages 10-12, *supra*) and *Noerr Motor Freight* (pages 12-14, *supra*). Another case strongly relevant—although not ultimately controlling because it involved a direct control on the press rather than a control on expenditures—is *Mills* v. *Alabama*, 384 U.S. 214. A State statute prohibited newspaper editorials advocating or opposing any candidate to be published on election day. The rationale for the statute was clear enough: the disappointed candidate would not have sufficient time to answer the last-minute editorial, which therefore could unfairly work to his detriment. The Court unanimously held that the law was unconstitutional, writing (384 U.S. at 219) that the law "silences the press at a time when it can be most effective. It is difficult to conceive of a more

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[35] See the concurring opinion of Mr. Justice Brandeis in *Whitney* v. *California*, 274 U.S. 357, 375-377. Cf. *Brandenburg* v. *Ohio*, *supra*; Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965).

obvious or flagrant abridgment of the constitutionally guaranteed freedom of the press."

It is hard to see why the Court would have countenanced the prohibition in *Mills* if, instead of prohibiting the editorial, the State had provided that no newspaper shall spend money to print last-minute editorials praising or denouncing candidates—or, to make the analogy even closer to FECA, if the same effect had resulted from an overall limitation by the State on the amount of money each newspaper could spend on political editorials. Yet if the expenditure of money does not distinguish *Mills*, it would be distinguishable only if the press has greater rights to speak than do individuals, an argument implicitly rejected in *Sullivan* and explicitly rejected in *Pell* v. *Procunier*, *supra*.

It may be, therefore, that in order to uphold FECA the Court will have to conclude that the governmental interests involved are so pressing that they would permit prohibition of speech by the press itself as well as by candidates and their supporters. Would the outcome in *Mills* have been different if the State had prohibited a candidate or one of his supporters from speaking on election eve (or at some earlier time) because he had exhausted a quota of "expensive speech"? The Court's answer to that question will be dispositive of many aspects of this case. *Mills* itself took an absolutist position with respect to political speech: "We hold that *no* test of reasonableness can save a * * * law from invalidation * * * when that law makes it a crime * * * to do no more than urge people to vote one way or another in a

publicly held election" (384 U.S. at 220; emphasis added).

However, it remains to be decided whether, in view of the revelations of Watergate, the changing perceptions of the electoral process, and the considered judgment of Congress that FECA is needed to cure the evils perceived, *Mills* should be qualified in the circumstances presented here.

Plaintiffs rely upon a series of essentially empirical arguments against the statute. They contend, for example, that FECA, by reducing the role of the "patron" in politics, will decrease the ability of small or unpopular parties to disseminate their views and attract support. If the argument is meant to indicate that patrons or large donors disproportionately support small or struggling parties, so that the contribution and expenditure limits of FECA would in fact narrow the range of political discourse by preventing some classes of ideas from entering the arena, it states (if true) an important argument against the statute.[36] One of the most significant arguments in support of FECA is its neutrality—it does not discriminate among types of political speech or particular speakers, but evenhandedly restricts the speech of all. If, in fact, patrons disproportionately support certain classes of parties or foster un-

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[36] To the extent this objection simply addresses the fact that the "patron's" speech has been limited, there is no greater reason to protect his speech if it is unpopular or unusual than if it would support majority parties; ideas are fungible for First Amendment purposes.

popular ideas, FECA, although neutral on its face, may not be neutral in practice.[37]

In regard to FECA's effect upon "seed money," the argument is that by eliminating a candidate's ability to rely upon large contributions, FECA has compelled him to seek a much larger number of small contributions, that mail solicitations are the most efficient way to seek such contributions, and that funds needed to finance the initial mailing and the initial communications[38] ("seed money") cannot now be raised in large donations from among a candidate's acquaintances.[39] Thus, the argument proceeds, the "seed money" itself must be raised in small donations, which is a difficult if not impossible task for a candidate who is not already quite well known, and the net effect of this process may well be to de-

[37] There is some tension between this argument against FECA and the argument, discussed at note 34, *supra*, that controls upon money simply shift the locus of inequality because the effects of money can be replaced with volunteer time, the support of "issue groups," and so on. They can be reconciled, however, with the observation that the patron may be instrumental in a party's or candidate's early days, before the positions they espouse have gained sufficient currency to attract other forms of support.

[38] According to *The New York Times* (July 21, 1975, p. 10, col. 3), by early July 1975 the seven declared candidates for the Democratic nomination for President had raised $10 million in contributions at a cost of $8 million, leaving a net return of but $2 million. No mail solicitations raised more than $2 for every dollar invested. Most of the candidates needed substantial "seed money" to launch their campaigns, and raised that money prior to the effective date of FECA.

[39] Because most loans are treated as contributions (18 U.S.C. 591(e)(1)), any large infusions may be beyond the reach of a candidate.

crease the number of people who can make effective campaigns for office, and to confine the opportunity to run to those who already hold some position of public visibility. However, only a sophisticated study of election campaigns for several years under FECA could tell whether candidates could obtain bank loans (which are not "contributions") or slowly amass small contributions, which might be sufficient alternatives. What must be decided now is whether, in light of the First Amendment, we can take the opportunity to find out.

B. Problems Unique To The Limitations On Contributions.

We turn to a discussion of some problems that the contribution and expenditure ceilings do not have in common.[40] We do not analyze in depth the par-

[40] The problems involved in limitations upon expenditures are analytically quite distinct from those involved in limitations upon contributions. In the case of expenditures, the problem is whether an individual (candidate or supporter), lawfully in possession of a sum of money, can use that money for the purpose of speaking. It is a purely personal question: can Congress tell an individual who is ready, willing and able to use money to speak that he cannot do so? In the case of contribution limits, there are two different problems, depending upon the point of view. Contributions cannot produce speech unless two independent actors—one with money and one desiring to use someone else's money for his own speech—can come together and collaborate. From the point of view of the would-be contributor, the question is one of vicarious speech. Does he have a First Amendment right to "hire" the candidate to express ideas for him, or to facilitate the candidate's expression by associating with him? From the point of view of the candidate, the question is one of soliciting aid. Does the candidate have a right to be "hired" as a speaker so that his own ability to communicate can be

ticular provisions of FECA; as before, we address the broader questions in an attempt to establish the framework within which the more particular decisions must be made.

From the point of view of the rights of the candidate, contribution limits indisputably restrain candidates' association and speech in some particular, but the restraining device is reasonably narrow. Contribution limits (without expenditure limits) are narrower than the restrictions upheld by this Court, albeit in a different context, in *Civil Service Commission* v. *Letter Carriers*, *supra*, and these narrow restrictions are directed with considerable accuracy to a discrete group—candidates for federal office—that may fairly be said to have accepted the restrictions as a condition of seeking office. Just as the government has an interest in ensuring propriety and the appearance of propriety in its bureaucratic employees, it has an interest in ensuring propriety and the appearance of propriety in its potential political governors.

The rights of the potential donor of funds are more seriously implicated by the contribution controls, and previous challenges to the constitutionality

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augmented? Contribution restrictions, although they partake of restrictions on speech, are therefore more closely associated with restrictions on political association. And restrictions on political association, although not favored (*Cousins* v. *Wigoda*, 419 U.S. 477; *Kusper* v. *Pontikes*, 414 U.S. 51), can be more easily supported than restrictions upon speech itself (cf. *Rosario* v. *Rockefeller*, 410 U.S. 752; *N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 463; *Cousins*, *supra*, 419 U.S. at 487-490).

of contribution limitations have involved donors' rights.[41] Two sorts of rights are affected by the contribution limits: the right of the donor vicariously to speak through the candidate, and the right of like-minded donors to associate together to advance and promote one of their own.

The FECA contribution limits are limited in scope (at least when considered independently of the expenditure limits) since contributions are not forbidden entirely—as is the case with contributions by corporations and labor unions—but merely are limited in amount. Each individual can contribute as much as $25,000 per year; each individual can contribute as much as $2,000 per candidate per campaign, at the rate of $1,000 for the primary and

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[41] On three occasions this Court has declined to pass upon the constitutionality of the prohibition in 18 U.S.C. 610. See *Cort* v. *Ash*, No. 73-1908, decided June 17, 1975; *United States* v. *Congress of Industrial Organizations*, *supra*; *Pipefitters Local Union No. 562* v. *United States*, *supra*. Lower courts have upheld the ban on contributions by unions and corporations. *United States* v. *United States Brewers' Association*, 239 Fed. 163 (W.D. Pa.); *United States* v. *Painters Local Union No. 481*, 79 F. Supp. 516 (D. Conn.), reversed on other grounds, 172 F.2d 854 (C.A. 2); *United States* v. *Boyle*, 482 F.2d 755 (C.A.D.C.). Commentators have agreed that contribution limitations are constitutional in principle. *Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1262-1265 (1975); Comment, *The Constitutionality of Restrictions on Individual Contributions to Candidates in Federal Elections*, 122 U. Pa. L. Rev. 1609 (1974). But see Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. Rev. 900, 919-921 (1971); Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. Chi. L. Rev. 148 (1974).

$1,000 for the general election (18 U.S.C. 608(b)(5)). Moreover, individuals can contribute to "political committees," which in turn can contribute as much as $5,000 to a candidate; contributions from political committees are not counted against an individual's per-candidate contribution limits (18 U.S.C. 608(b)(1)).[42] In addition, each individual can contribute as much as $500 in incidental expenses connected with volunteer services, or a total of $1,000 per candidate (this limit, too, applies separately to the primary and the general election), and each individual may be able to contribute unlimited amounts to the campaigns of individuals who seek election as Electors of the Electoral College, whether or not those Electors are pledged to a candidate.[43] Individuals retain the right to speak for themselves to advance ideas or to advocate the election or defeat of any candidate, and the right to band together with third parties to advance ideas or advocate the election or defeat of any candidate.

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[42] If the contributions to a political committee are in any way "earmarked" for later contribution to a candidate, they do count against the individual's $1,000 limit. See 18 U.S.C. 608(b)(6).

[43] 18 U.S.C. 591(b) defines "candidate" as an individual who seeks nomination for or election to federal office. 18 U.S.C. 591(c) defines "Federal office" in a way that excludes candidates for Elector. It could be argued, however, that such contributions are indirect contributions to the candidate for President, and therefore subject to the $1,000 general election limitation.

The countervailing considerations in this regard are of course those previously discussed.

C. Problems Unique To The Limitations On Expenditures.

1. *General Considerations.*

The central question involved in expenditure limitations, which is quite different from that involved in contribution limitations, is whether a person can be prohibited from spending money to communicate an idea, belief, or call to action. This Court has dealt with similar questions in different contexts. See *Brandenburg* v. *Ohio*, *supra*; *New York Times Co.* v. *Sullivan*, *supra*; *Noerr*, *supra*; *Letter Carriers*, *supra*. In regard to expenditures and speech relative to candidates for public office, there is a unique set of justifications for what is otherwise a rather sweeping restriction of communications. The question confronting this Court may thus be whether the additional value of expenditure prohibitions, over and above the value of the other provisions of FECA, justifies such limitations.

This Court has never considered the constitutionality of controls on campaign expenditures, except by analogy; it has, many times (see, *e.g.*, *Mills* v. *Alabama*, *supra*; *Monitor Patriot Co.* v. *Roy*, *supra*), struck down restrictions upon speech during a campaign, and there may be no reason to suppose that cases like *Mills* and *Monitor Patriot* would have been decided differently had the State attempted to regu-

late only the cost of the political speech it found disquieting."

" In one of the earliest reported cases on expenditure controls (*State ex rel. LaFollette* v. *Kohler,* 200 Wis. 518, 228 N.W. 895) the Supreme Court of Wisconsin upheld an expenditure control law prohibiting a candidate from spending more than $4,000 in an attempt to secure the governorship. The court wrote (*id.* at 565):

> It is a matter of common knowledge that men of limited financial resources aspire to public office. It is equally well known that successful candidacy often requires them to put themselves under obligation to those who contribute financial support. * * * [T]hese obligations may be carried over so that they color and sometimes control official action. The evident purpose of the act is to free the candidate from the temptation to accept support on such terms and to place candidates * * * upon a basis of equality * * *.

The court noted, however, that independent expenditures in support of a candidate were permitted; citizens or groups could "upon their own initiative * * * support the candidacy of any person of their choice" (*id.* at 564), which would "be a support of principles rather than a personal claim upon a candidate's consideration should he be elected" (*id.* at 565).

More recent cases, however, have found expenditure controls to be constitutionally deficient. See *Deras* v. *Myers, supra* (Supreme Court of Oregon invalidating expenditure controls on both candidates and independent speakers); *Bare* v. *Gorton, supra* (Supreme Court of Washington invalidating similar expenditure controls); *Abercrombie* v. *Burns,* 377 F. Supp. 1400 (D. Hawaii) (limiting media expenditures by candidates is unconstitutional). Cf. *American Civil Liberties Union* v. *Jennings,* 366 F. Supp. 1041 (D.D.C.), vacated as moot *sub nom. Staats* v. *American Civil Liberties Union, Inc.,* No. 73-1413, decided June 23, 1975 (law requiring newspaper to obtain approval of candidate before accepting payment for political advertisement is unconstitutional).

2. Limitations upon the expenditures of "independent" speakers.

Perhaps the heart of FECA's expenditure controls is its restriction upon the expenditure of funds by *any person* (18 U.S.C. 608(e)) "relative to a clearly identified candidate during a calendar year * * * advocating the election or defeat of such candidate [and exceeding] $1,000." Without this restriction it would be a simple matter for candidates or other individuals to form "independent" committees in support of the candidate, and whatever benefit expenditure controls offer would be lost. The court of appeals concluded (J.S. App. 1530) that "the limitation on expenditures relative to a clearly identified candidate is a * * * means of closing a loophole that would otherwise destroy the effectiveness of" the expenditure restrictions. The question remains whether, if this expenditure control is necessary to close loopholes, it follows that it is therefore constitutional under the First Amendment.

In this regard, it may be important that FECA allows to each individual $1,000 worth of speech, so that communication is not entirely forbidden. Moreover, speakers unconnected with a specific candidacy can spend sums without limit upon discussion and dissemination of ideas and suggestions about public policy, though, in some cases, the effect may be to assist an issue candidate. The expenditure controls do not suppress ideas as such, but simply restrict the right of speakers to advocate the election or defeat of candidates who may or may not be supporters of the speaker's ideas.

While some forms of speech are thus permitted, other forms of speech—for or against candidates—are restricted. This may be justified if there is a compelling governmental interest in devising a more effective enforcement method of improving, detecting and reducing incentives to violate the contribution and disclosure provisions of FECA.

New York Times Co. v. *Sullivan*, *supra*, and *Monitor Patriot Co.* v. *Roy*, *supra*, indicate that one of the most important First Amendment values is speech *against* candidates for public office.[45] While FECA does not regulate a person's ability to say that politicians hold wrong ideas, or have abused their office, or are corrupt, if one names the politicians involved FECA's restrictions come into play. FECA's restrictions upon independent expenditures thus directly affect the right of the people to criticize their elected officials.[46]

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[45] Also, if there is a right to speak out against public officials, there would seem to be a concomitant right to speak out in favor of their opponents. See *Noerr*, *supra*, recognizing the right of groups to communicate in an attempt to elect candidates that they perceive will be favorable to their vested interests.

[46] Professor Emerson, a strong supporter of many of the types of regulation ultimately incorporated in FECA, observed (Emerson, *supra*, at 639-640):

> Funds expended for expression by the electorate at large do not generate [the] dangers [to which contribution and disclosure requirements are directed]. Hence a control narrowly limited to correct a grave abuse would not reach beyond restrictions upon the candidate himself, and would not be justified outside the election processes. * * * [R]egulations confined to candidates and election campaigns are directed to a limited end and deal with a limited situation. Hence they can be formulated with some objectivity and avoid the dangers of abuse in administration. This cannot be done with regulations, particularly equalization regulations, addressed to the innumerable different kinds of people seeking to express themselves for different purposes throughout the whole system of free expression.

3. *Expenditures by candidates.*

The court of appeals (J.S. App. 1537-1539) upheld the general restrictions upon candidate expenditures in Section 608(c) as necessary to achieve enforcement of the disclosure rules and contribution limitations, both by making violations easier to detect and by removing an incentive to collect excessively large contributions. It concluded that "given the power of money and its various uses, and abuses, in the context of campaigns, there is a compelling interest in its regulation notwithstanding incidental limitations on freedom of speech and political association" (J.S. App. 1538-1539). It may be, however, that restrictions upon money are more than "incidental" restrictions upon speech (see pp. 20-27, *supra*). Moreover, the court of appeals was acting upon the assumption that the restrictions upon independent expenditures are constitutional. The analysis of candidate expenditures changes if 18 U.S.C. 608(e) is unconstitutional. If Section 608(e) is stricken, "the ceiling [on candidate expenditures] could be wholly evaded by the establishment of 'independent' groups collecting and spending money on behalf of a candidate. A statute so easily avoided as to be a worthless

burden on political activity would be an unconstitutional as well as an unwise means of regulating elections" (*Developments in the Law—Elections*, *supra*, 88 Harv. L. Rev. at 1258; footnote omitted).

Section 608(c) limits the amount of speech. One governmental interest fostered by Section 608(c) is the need to make the contribution and disclosure provisions marginally more effective.[47] Whether that interest is sufficient is a difficult question. Support may be derived from *Letter Carriers*, for candidates are a self-selected group that can escape the expenditure limitations by entering other lines of work. But to pass constitutional muster, the interests supporting FECA must be deemed urgent enough to justify expanding the *Letter Carriers* rationale to the political process as a whole.

Judge Tamm, concurring in part and dissenting in part, observed (J.S. App. 1604) that the candidate expenditure limitations of Section 608(c) impinge upon the speech rights of contributors and potential contributors by diminishing their ability to make effective use of the contributions permitted by FECA. The court of appeals thought otherwise (J.S. App. 1539). It does appear, however, that the expenditure ceilings make nugatory any contributions that would enable the candidate to exceed the ceiling. Once the candidate has reached his expenditure ceiling, the rights of a contributor to associate himself with the

[47] Other interests have been advanced, and we have discussed these at pages 22-57, *supra*.

candidate's speech, or to express himself through the candidate, are terminated. If a candidate allowed to spend $70,000 (18 U.S.C. 608(c)(1)(E)) attracts twice that sum, the *effective* contribution limit of those who still wish to contribute becomes zero, and the effective contribution of those who already have contributed is only half of the sum each gave. This problem inheres in all candidate expenditure limits.

4. *The effects of the "safety valves".*

Section 608(a) allows candidates to spend personal funds, and the funds of their immediate families, in sums exceeding the $1,000 contribution and expenditure limits. It applies equally to all candidates, and its major effect is that it allows the well-to-do to retain some of the advantage of their greater wealth. While the contribution limits of FECA disable relatively poorer candidates from having access to wealthy patrons, requiring candidates to rely on their own resources for any large infusions of funds, this seems an even-handed disability since it treats people without regard to their wealth. Indeed, even candidates who can afford to expend $25,000 on their own behalf (18 U.S.C. 608(a)(1)(C)) could nevertheless benefit from contributions from wealthy patrons: such candidates, no less than candidates who cannot afford to spend on their own behalf, are simply remitted to their own resources. Moreover, as the court of appeals pointed out (J.S. App. 1531-1533), Section 608(a) prevents the wealthy from spending *more* than certain sums on their own behalf, and so

aids the less well-to-do; in addition, Section 608(a) allows the less well-to-do to gather funds from their immediate families, and so makes it possible to raise at least some "seed money." Of course, by allowing candidates to spend substantial sums of their own money, Section 608(a) does allow wealth to have substantial influence, although the aim of the contribution limits is to lessen such influence.

There are several other "safety valve" sections in FECA. Section 608(e)(2)(B) provides that any expenditures that labor unions or corporations are permitted to make under Section 610 (the Federal Corrupt Practices Act) are not "expenditures" for purposes of FECA. Section 610, as construed by this Court, permits corporations and unions to form "voluntary" political funds and spend whatever contributions they can attract. *Pipefitters* v. *United States*, *supra*. Accordingly, corporations and unions can accept and spend funds without limit supporting or advocating the defeat of candidates. As "political committees," such voluntary funds also can contribute $5,000 to any candidate.

Similarly, "issue" groups that take public positions on issues that may be highly important in an election, and on which a candidate's position may be well known, may make limitless expenditures even though those expenditures will be substantially beneficial or detrimental to candidates whose success the issue group wishes to promote or retard. Finally, those who own newspapers, periodicals or electronic media apparently (2 U.S.C. 431(e) and (f); 18 U.S.C. 591

(e) and (f); J.S. App. 1536-1537) can spend funds without limit to advocate the election or defeat of candidates in their pages or over the airwaves.[48] All of these provisions are perceived as "safety valves" designed to avoid First Amendment problems or upsetting settled practice.

In view of these "safety valve" provisions, it may be that money will retain much of its old power if it can be applied through corporation or labor union funds, or through "issue groups," rather than through the candidate himself. Inequality will remain, for there is no reason to suppose that corporate and labor funds, or "issue groups," will distribute their support any more equally than did those who donated directly to candidates. And, of course, the influence of such groups, no less than cash in hand, can be exchanged for a candidate's express or implied promises of support if elected. Public confidence may as a result continue to be shaken, whether or not candidates are improperly influenced by promises of support by corporations, unions, "issue" groups and the media. Ordinarily, these safety valve provisions would not affect a statute's constitutionality, for Congress is not required to deal with all aspects of a problem at once

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[48] The court of appeals (J.S. App. 1537) thought that this exemption showed that "Congress had no intention of controlling an independent press by this statute." However, there are controls upon independent expenditures (Section 608(e)), and under this Court's decisions the Constitution affords no greater protection to the press than to those who wish to expend their money to purchase space in it. *New York Times Co.* v. *Sullivan, supra; Bigelow* v. *Virginia, supra.*

and may decide which aspects to address when it does act. However, to the extent the safety valves undercut FECA's effectiveness they may affect the constitutional balance; the prospect of a statute's achieving its goals may affect the constitutionality of its restrictions on the freedom of speech.

5. *Is the expenditure ceiling too low?*

If the Court concludes that expenditure ceilings are constitutional in principle, and as structured by Section 608, then it would consider next whether the ceilings set are too low. We have set forth in the margin some considerations concerning whether the ceilings are relatively low.[49] The Court may evalu-

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[49] The FECA ceilings are of course considerably lower than what recent presidential candidates have raised and spent. Relative to congressional races, the ceilings are higher than the expenditures of most recent campaigns, but considerably lower than the costs of recent campaigns in larger States.

A candidate for President can expend $20 million in the general election, or less than 10 cents per citizen; a candidate for the Senate can expend the greater of 12 cents per member of the voting age population or $150,000; a candidate for the House in a state with more than one Representative can expend $70,000 (18 U.S.C. 608(c)(1)). A presidential candidate could expend his entire budget by purchasing only 200 minutes of prime time on television at $100,000 per minute (divided over three networks, that would be less than two hours of viewing time per network). A candidate for Senator would exhaust his budget by mailing a single first class letter to each potential voter (and, of course, once postal rates reach 13 cents per ounce, he could not even pay the postage, let alone the stationery, stuffing, and address list costs). Presidential candidates routinely would be outspent by innumerable

ate these in terms of whether it was necessary for Congress to set these ceilings or whether higher ceilings would suffice.

III. DISCLOSURE OF CONTRIBUTIONS.

A. General Principles.

1. *Introduction.*

Disclosure enables citizens to decide whether to vote for a candidate in light of the candidate's sources of financial support and, if the public knows who has given financial support to a candidate, this may deter improper contributions and the exertion of undue influence by supporters who can achieve their ends only so long as their ties to a candidate are beyond the public ken. See *Grosjean v. American Press Co., supra,* 297 U.S. at 250.

Disclosure also affects speech and associational rights. When the candidate's position is unpopular or his party affiliation such that some of his supporters might be held up to ridicule or suffer adverse consequences (such as loss of employment) if their support were known, public disclosure may deter many individuals, the brave and the timid alike, from associating with others to support their common cause.

Even when there is no possibility of reprisal because of one's beliefs and associations, public disclo-

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commercial advertisers (II A. 7-9). And an independent citizen would not be able to afford even a quarter of a page of a major daily newspaper to speak his piece on a candidate for public office (II A. 32).

sure may have an important effect. Many individuals, because of the nature of their employment or position, must lead "public" lives that are nonpartisan. This was the basis for the decisions in *Letter Carriers, supra,* and *Broadrick* v. *Oklahoma, supra.* Civil servants should not have public political identities; many others must maintain a discreet public neutrality, and consequently must express their beliefs in private or not at all. Association with other politically like-minded men and women may offer these people what is, perhaps, their only avenue of political participation other than the vote itself. For such persons, public disclosure of their contributions might have the same effect as public disclosure of the party for which they cast their vote.

The court of appeals therefore concluded that disclosure provisions must be subjected to searching scrutiny, and can be justified only by the most pressing needs. The court of appeals declared unconstitutional 2 U.S.C. 437a (J.S. App. 1549-1560), which requires disclosure of the membership lists of organizations that engage in political speech, and the Commission has not appealed that judgment. The court, however, believed that suitably limited disclosure can be a tool of such value that the benefits it can provide are more than adequate to survive that scrutiny. The question presented here, therefore, is whether the disclosure requirements of FECA are suitably limited.

Before turning to an analysis of the specific provisions of FECA, we discuss the principles developed

in the many opinions of this Court that have addressed one form or another of disclosure requirements.

2. Constitutional balancing principles used in disclosure cases.

This Court first upheld a significant disclosure requirement in *Burroughs and Cannon* v. *United States,* 290 U.S. 534, which involved a provision of the Federal Corrupt Practices Act of 1925, 43 Stat. 1070, requiring the treasurer of every political committee to file certain financial reports with the clerk of the House of Representatives. However, the Court did not address the First Amendment because no First Amendment challenge was raised.[50]

United States v. *Harriss,* 347 U.S. 612, involved the validity of the Federal Regulation of Lobbying Act's requirements that all those receiving or expending money for the purpose of influencing pending legislation make detailed reports on their clients and finances. The Court sustained the Act against a First Amendment challenge, holding that the Act properly maintained governmental integrity by giving legislators information needed to evaluate the

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[50] See also *United States* v. *Wurzbach,* 280 U.S. 396, in which the Court upheld another portion of the Federal Corrupt Practices Act against claims of excessive vagueness, concluding that "[i]t hardly needs argument to show that Congress may provide that its officers and employees neither shall exercise nor be subjected to pressure for money for political purposes, upon or by others of their kind, while they retain their office or employment."

source of pressure from lobbyists, and that the restraint upon persons not covered and seeking only incidentally to influence legislation was "indirect," if not hypothetical.

Relying upon *Burroughs and Cannon* and *Harriss*, the court of appeals (J.S. App. 1541-1545) joined *Stoner* v. *Fortson*, 379 F. Supp. 704 (N.D. Ga.) (three-judge court), and *United States* v. *Finance Committee to Re-Elect the President*, 507 F.2d 1194 (C.A.D.C.), in upholding the major provisions of the disclosure requirement and its application to all contributions exceeding $100.[51]

Harriss, however, dealt with a very narrow statute, which was directed not to the public at large but only to lobbyists attempting to influence pending legislation. The Court there did not have occasion to deal with the First Amendment considerations involved when many people, seeking to make their views generally known in order that others may be persuaded, pool their resources, which alone could not accomplish this aim. In regard to that situation, the Court has held that "freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. * * * The

[51] Cf. *Buettell* v. *Walker*, 59 Ill. 2d 146, 319 N.E. 2d 502, upholding a State executive order compelling all those who do business with the State to disclose all contributions made to elected and appointed officials, and to their campaigns. The court held that the order was narrowly drafted to reach only those who might realistically exert influence over public officials.

right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57.[52] The Court concluded in *Kusper* (414 U.S. at 58): "a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest."

That a disclosure law might infringe to an intolerable degree the freedom of speech and association can scarcely be doubted. In *Talley* v. *California*, 362 U.S. 60, the Court held unconstitutional a city ordinance prohibiting the distribution of handbills unless the handbill displayed the name and address of its author. The requirement of identification "would tend to restrict freedom to distribute information and thereby freedom of expression" (362 U.S. at 64). Because retaliation is more easily ac-

[52] The Court repeated the same theme in *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441, noting that, although states undoubtedly have great power to regulate the conduct of their elections, they cannot use their power in a manner that burdens the right of speech or association of political parties. See also *Cousins* v. *Wigoda*, 419 U.S. 477. In *Cousins* the National Democratic Party had unseated and replaced delegates to its convention who had been properly elected under state law. The state courts enjoined the unseating and replacement, reasoning that the State had a compelling interest in protecting the "integrity of its electoral processes" (*id.* at 489). The Court agreed that there was such an interest, but held that it was insufficient to permit the State to interfere with the freedom of association of the delegates because (*id.* at 487-488): "Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."

complished against a known speaker,[53] "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance" (*id.* at 65).

If the deterrence of speech by such disclosure may sometimes violate the First Amendment, the deterrence of association may do so as well. In *N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U.S. 449, the State had demanded that the N.A.A.C.P. turn over the names of its members in order to qualify to do business as a foreign corporation. The Court struck the requirement down, concluding that it would work a significant interference with the freedom of association and that the State had not shown any sufficient countervailing interest, particularly since it was far from clear that disclosure would have a substantial bearing on whether the organization had complied with the registration law. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [direct prohibitions]. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. * * * Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of asso-

[53] "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all" (362 U.S. at 64).

ciation, particularly where a group espouses dissident beliefs" (357 U.S. at 462). See also *Bates* v. *Little Rock*, 361 U.S. 516; *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250-255.

Perhaps the first law to be held unconstitutional because of its requirement of disclosure was the requirement in *Thomas* v. *Collins*, *supra*, that union organizers register with a state agency and obtain an organizers' card. The State's justifications were that it desired to protect workers from entreaties by organizers who were receiving support from unknown sources and who might be disguised agents of unpleasant principals. The Court wrote (323 U.S. at 540):

> We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.
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> Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussicn comprehends, as when he undertakes the collection of funds or securing subscriptions, he enter a realm where a reasonable registration or identification requirement may be imposed.

So it would have been permissible for the State to require the organizer to identify himself when money changed hands. Would it have been permissible to require the donors to identify themselves as well?

This is a serious constitutional question.[54] The Court intimated no answer.[55]

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[54] See *United States* v. *Rumely*, 345 U.S. 41, in which the House Select Committee on Lobbying Activities desired to secure the names of all those who purchased more than $1,000 worth of any individual book published by Rumely. Rumely's books were political in nature, and the Committee reasoned that the names of the purchasers would help it to discover those who might be engaged in certain forms of lobbying. It cited Rumely for contempt of Congress when he declined to disclose the names. The Court declined to enforce the citation, narrowly construing the Committee's grant of authority in order to avoid what it perceived to be constitutional problems of the first magnitude. Cf. *Lamont* v. *Postmaster General*, 381 U.S. 301.

[55] A number of lower federal courts, attempting to harmonize *Harriss* with cases such as *Talley* and *N.A.A.C.P.* v. *Alabama*, have held disclosure requirements of various sorts unconstitutional. For example, *Pollard* v. *Roberts*, 283 F. Supp. 248 (E.D. Ark.) (three-judge court), in which Mr. Justice Blackmun participated as a Circuit Judge, invalidated an Arkansas statute that allowed a prosecuting attorney to subpoena financial records of the Republican Party for an investigation into vote-buying allegations. The court observed that the Republican Party was a minority party in Arkansas and that such investigations would inhibit the willingness of adherents to contribute; it recognized that the impetus for the investigation was legitimate, but concluded that a legitimate reason is not enough. It held that the Party's records of contributors could not be obtained unless necessary to confirm specific information that a specific contribution had been used for illegitimate purposes. The State appealed, and this Court summarily affirmed. 393 U.S. 14.

Lewis v. *Baxley*, 368 F. Supp. 768 (M.D. Ala.) (three-judge court), involved a disclosure statute similar to that of *Harriss* but directed to newsmen instead of lobbyists. The district court held that the disclosure would create an excessive inhibitory effect, and that the interest of the public and the legislators in discovering bias or financial interest in reportage of legislative affairs was not sufficiently compelling to

One thing, however, is certain: the apparently heavy burden of demonstrating the constitutionality of a law compelling disclosure of the identities of those who adhere to a particular political position can be met in some circumstances. When, as in *United States* v. *Harriss*, *supra*, nondisclosure may lead to bribery and political influence by lobbyists not subject to the test of the marketplace of ideas, a law compelling disclosure is both necessary and appro-

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justify the chill involved. And in *Printing Industries of the Gulf Coast* v. *Hill*, 382 F. Supp. 801 (S.D. Tex.) (three-judge court), remanded for consideration of possible mootness, No. 74-456, decided June 30, 1975, the district court held unconstitutional a statute requiring all political advertising to bear the name and address of both the printer and the person or group paying for the advertisement; the court held that even the compelling state interests of prevention of fraud and provision of information to the voter are not sufficient to justify the extinguishment of anonymous political speech. Cf. *Zwickler* v. *Koota*, 290 F. Supp. 244 (E.D. N.Y.), vacated as moot *sub nom. Golden* v. *Zwickler*, 394 U.S. 103 (statute forbidding anonymous campaign literature is unconstitutional); *People* v. *Duryea*, 44 A.D.2d 663, 354 N.Y.S. 2d 129, affirming 76 Misc. 2d 948, 351 N.Y.S. 2d 978 (New York law forbidding anonymous political publications is unconstitutional even as to candidate who uses anonymity as a shield for fraud); *United States* v. *Insco*, 496 F.2d 204 (C.A. 5) (construes antifraud statute to avoid constitutional question presented by prohibition of anonymity); *City of Carmel-by-the-Sea* v. *Young*, 2 Cal.3d 259, 85 Cal. Rptr. 1, 466 P.2d 225 (statute requiring public officials to disclose their personal investments exceeding $10,000 is unconstitutional). See also Emerson, *supra*, at 645 ("It will be a rare situation * * * when a disclosure requirement enhances the system of freedom of expression, rather than doing it serious damage").

priate.[56] Disclosure may similarly be appropriate when it supplies information needed to evaluate the fitness of an individual for a particular office. The questions in each case are whether the scope of the disclosure is necessary to achieve the legislative aim, and whether that aim is sufficient to justify the effect of disclosure on the freedom of speech and association. Cf. *Branzburg* v. *Hayes*, 408 U.S. 665, 700. FECA must be tested under these standards.

B. The Threshold For Disclosure—Is $100 Too Low?

Only contributions between $100 and $1,000 are subject to disclosure under FECA; contributions larger than $1,000 are forbidden entirely. The importance of requiring a candidate to reveal the names of all contributors whose support is such that it could significantly influence the candidate's performance in office, if elected, cannot be doubted. The court of appeals pointed to examples of the influence of contributions upon performance in office, of the "sale" of ambassadorships, and of the alteration of public policy in an effort to secure large contributions (J.S. App. 1515-1516).

The question here, however, is whether the contributions subject to disclosure could produce such evils. In this regard the court of appeals did not find that

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[56] "Because lobbyists are nothing more than spokesmen for the interests they represent, Congressmen have a stronger interest in knowing who sponsors lobbyists than voters have in knowing who has contributed to a candidate's campaign." *Developments in the Law—Elections, supra,* 88 Harv. L. Rev. at 1246.

individual contributions of $100 could influence a candidate's performance in office. Instead, it thought that the $100 disclosure threshold was proper because the limit had to be low enough to detect patterns of giving; that is, numerous individuals similarly situated could contribute sums that might have an effect upon the candidate, even if none of the individual contributions had such an effect.[57] For example, if every member of an agricultural cooperative donated $100 to the campaign of a candidate for the House, the total contribution would be quite large; such information could be useful to the electorate in its choice and the pattern of giving could have an effect upon the candidate's performance in office. Perhaps the precise issue, then, is not whether, under the First Amendment, $100 is too low a threshold for individual contributions, but whether it is too low when the possibility of aggregation is taken into account.

That is a difficult question to analyze, for one would have to estimate not only how often such patterns would occur if the threshold were higher, but also how prevalent such patterns will be with a $100

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[57] A pattern of repeated giving by a single individual could be detected and revealed by requiring political committees and candidates to keep detailed records of each contribution and to reveal the contribution *total*, but only when the total exceeded the sum judged to be capable of influencing the candidate's performance; FECA now makes similar provision for the recording of all contributions of $10 or more, and for public disclosure only when the total reaches $100 (see 2 U.S.C. 432(c) and (c)(2); 2 U.S.C. 434(b)(2)).

threshold. It is a question upon which we simply lack sufficient information to form an opinion.

We close this portion of the discussion by pointing out that under FECA the disclosure threshold is the same for all candidates for all offices. A contribution of $100—or even a pattern of repeated contributions of $100—will have less potential effect in a presidential campaign (with an expenditure ceiling of $20 million) than in a House campaign (with an expenditure ceiling of $70,000). The public interest in knowing the name, address and occupation of the contributor may correspondingly be much less in the case of the presidential campaign, while the inhibitory effect caused by disclosure is likely to be greater in the presidential campaign if the lists of contributions will be more widely circulated and inspected by more people.[58]

[58] As an alternative, Congress could have relied upon a dual trigger: the contribution, in order to be disclosed, must be high both in absolute amount and in proportion to the candidate's total budget. For example, a law might provide that contributions would be disclosed only if they exceeded some absolute figure and exceeded one half of one percent of the campaign budget. For a presidential campaign conducted under the the FECA ceilings, that standard would require disclosure of contributions exceeding $10,000. Because individual contributions cannot exceed $1,000, this rule would come into play only when a pattern of giving by similarly-interested individuals produced an aggregate contribution exceeding $10,000 (that is, if 10 or more similarly-interested individuals contributed $1,000 each).

C. Special Applications.

1. *Disclosure by minor and unpopular parties.*

The application of disclosure requirements to small or dissident parties raises other considerations since candidates from such parties are rarely if ever victorious, and at the same time (and for the same reasons they are unlikely to attract a plurality of the votes) the views they espouse are much more likely to be unpopular.[59] Chief Judge Bazelon stated that contributors to unpopular causes are most susceptible to the inhibitory effects of disclosure, for "to be publicly labeled, *e.g.*, Socialist, Communist, or Nazi is to invite social ostracism, loss of business or employment, verbal or physical abuse, or worse" (J.S. App. 1594, dissenting in part); he therefore concluded that under decisions of this Court such as *Talley* and *N.A.A.C.P.* v. *Alabama* the disclosure provisions cannot constitutionally be applied to small or dissident parties.

The court of appeals recognized that contributions to minor parties would be deterred (J.S. App. 1547) and that, "[s]o far as unpopular minor parties are concerned, disclosure does indeed infringe their First Amendment freedom to associate to advocate unorthodoxy" (J.S. App. 1548). It nevertheless upheld the application of the disclosure requirements to

[59] Small and unpopular parties are required to make disclosure on the same basis as other parties; small parties are denied public funds under Subtitle H on the ground that they are unlikely to prevail.

minor parties, upon three grounds: that there is only "scant" evidence (*id.* at 1546) tending to show a "chilling effect"; that contributions of less than $100 will not be deterred (*id.* at 1546, n. 116; 1547, n. 119); and that minor parties otherwise could be used as "stalking horses" by major parties (*id.* at 1547-1548).

Neither the position of Chief Judge Bazelon nor the analysis of the majority is decisive. Because the adherents of minor parties will not be elected, there is no possibility that candidates will acquire money in exchange for an express or implied promise of favors while in office. Potential contributors do not feel compelled to give in order to minimize the chance that the successful candidate will penalize noncontributors. Minor parties do not attain "unfair" advantages by outspending their opponents; the reverse may be true. On the other hand, although in many areas an individual might not be subject to harassment if his neighbors or his employer learns that he supports the Democrats or Republicans, the results could be different if his neighbors (or employer) learn that he supports the Progressive Labor Party, the Socialist Workers Party, the Nazi Party, or even the Libertarian Party or the N.A.A.C.P. The court of appeals pointed out that there is only scant evidence of a chilling effect on minor party contributors, while Chief Judge Bazelon thought that the relationship between anonymity and contribution rates would be impossible to establish (J.S. App. 1595).

We do not seek to resolve this dispute, but we do note the inherent difficulty of defining with any degree of certainty what is meant by a "minor" party whose contributors would be subject to harassment if their names were disclosed. The situations may vary from one section of the country to another, from one "minority" party to another, from one time to another. Indeed, in Arkansas in 1968 the Republican Party might have fit that description; at least the three-judge court in *Pollard* v. *Roberts*, *supra*, so held. The difficulty in drawing a meaningful distinction may therefore suggest that the disclosure requirements must be upheld as applied to all parties or struck down in their entirety.

2. Disclosure by other unsuccessful candidates.

Candidates of minor parties are a subset of the class of all "unsuccessful" candidates—those who do not (and who often have no prospect to) receive a plurality of the vote in either the primary or the general election. Candidates who had a chance to win, but who happened to lose, can present (although certainly less urgently) the problems presented by requiring disclosure by unpopular candidates of minor parties. Candidates who lose cannot, by definition, exchange official favors for the contributions they have received. And the donation of large sums of money by selfish interest groups may well be deterred simply by the prospect that, if a candidate prevails, he will have to make a full accounting of the sources of his support. Also, the contributor to

a losing candidate could face the possibility of retribution by the winner. If the supporters of the losers are made known, some people may be less likely to support "underdog" candidates.

But requiring disclosure only of the winners' contributors would mean that disclosure must follow the election rather than precede it.[60] If disclosure did not occur until after the election, voters would be less informed about the supporters of the candidates and would be denied one of the important benefits of disclosure.

3. ***Disclosure before primary elections.***

Many more candidates are involved in primaries than are involved in the general election. The considerations regarding the constitutionality of requiring all general election candidates to disclose their contributors prior to the general election may not carry over with as much force to pre-voting disclosure in primaries. The primary winners (and their pre-primary contributions) will be subjected to full voter scrutiny before they have an opportunity to be elected. If disclosure of contributors to primary candidates occurred only after the primary and only in regard to the winners, the voters could nevertheless

[60] Some candidates, of course, might disclose their contributions voluntarily, knowing that, if they won, they would have to do so eventually; voters might view with some suspicion candidates who insisted upon waiting until after the election. If substantial numbers of candidates came forward with pre-election disclosure, that would achieve the same result as the present law.

cast their ballots in the general election with full knowledge of the identity of the candidate's supporters at every stage of his campaign. However, they would be denied that information prior to the primary. At the same time, if the contribution lists of the losers are not required to be disclosed, this would diminish the adverse effect on freedom of expression and association.

IV. PUBLIC FINANCING OF CANDIDATES FOR PRESIDENT.

When proposals for public financing of campaigns for election were under consideration by Congress in 1967, Majority Leader Mansfield remarked that the questions involved in public financing are "questions which go to the very heart and structure of the Government of the Republic" (113 Cong. Rec. 12165 (1967)). We doubt that any party to this case will take issue with that statement; the issues involved here are of indisputable moment. The provisions in the Act providing matching funds for candidates for nomination for president, and complete federal financing of the presidential campaigns of the "major" parties, will produce a dramatic change in American political life. FECA affects the role of the party in campaigns for office, changes the role of the incumbent government vis-a-vis all parties, and affects the relative strengths and strategies of candidates vis-a-vis each other and their party's leaders.

The financing provisions of the Act, by eliminating private funds from any role in the general elec-

tion campaign, may produce profound effects in the way candidates approach issues and each other. On the one hand, candidates may feel more free to discuss issues and take stands that previously might have offended major contributors. On the other hand, many contributors have been vigorous supporters of candidates who took particular stands; the fund-raising successes of Senators Goldwater and McGovern, and of Governor Wallace, bear strong testimony to the influx of money that will follow strong stands responsive to important segments of popular opinion. It may be that, with the possibility of such rewards removed by the Act, many candidates will feel less inclined than presently to take clear positions on important and divisive issues. These overarching issues pose questions to which we know no answers; we limit our discussion here to the question of congressional power to provide public funds to private parties, and the considerations pertinent to FECA's different treatment of smaller parties.

A. Sources Of And Limitations On Congressional Power.

Article I, Section 8, clause 1 of the Constitution contains a broad grant of power to tax and spend for the general welfare. As this Court has emphasized (*United States* v. *Butler*, 297 U.S. 1, 66), the grant of power to Congress is plenary, subject only to constraints found in other provisions of the Constitution. Congress is the sole judge of whether a spending measure promotes the general welfare for purposes of Article I, Section 8, clause 1, and

it is not open to the courts to reconsider whether the statute is wise.[61]

Tax dollars "checked off" and designated for the campaign fund may not be voluntary contributions: the taxpayers' taxes are the same whether or not they make a designation and they cannot designate any particular party or candidate as a recipient. Nevertheless, if Congress has the power to subsidize campaigns out of the general treasury then the "non-voluntary" nature of the contribution is of no significance.

If there is any bar to the principle of public financing of political campaigns, it would have to come not from the taxation and spending clause but from the First Amendment. Cf. Mr. Justice Black, dissenting in *International Association of Machinists* v. *Street*, 367 U.S. 740, 788. Majoritarian democracy depends, however, upon the conscription of other people's money; those who are outvoted are taxed to support projects and programs they disapprove, and it is no answer to invoke the First Amendment as a bar to levies of this sort. It is difficult to find a principled distinction between levying a tax for the purpose of running a "model cities program" or building a submarine that 49 percent of the people

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[61] If that concern were relevant to this portion of the argument, however, it would be answered by the fact that public financing, at least in principle, promotes the public welfare by enabling candidates to communicate more effectively (see pages 51-58, *supra*), by providing money to enable a candidate to solicit small contributions more effectively, and by reducing the incentive to accept or become dependent upon large contributions (see pages 31-37, *supra*).

oppose, and levying a tax for the purpose of enabling people to discuss (without government direction or control of the content of the discussion) the "model cities program" and submarine that some people would oppose. Indeed, if any distinction could be drawn, the distinction should favor expending public funds to support speech, for under the Constitution speech is a premium good, to be assiduously fostered.

B. Excessive Entanglement: The Analogy To Church And State.

The feature of federal financing of political campaigns that is most apparent, and least subject to dispute, is that federal money is accompanied by federal involvement. Federal financing leads, in some cases, to some degree of federal control. FECA provides for careful auditing in order to ensure that the dollars provided from the Treasury will be used only for allowable purposes.

When public financing of political parties was introduced in the Federal Republic of Germany, the Constitutional Court struck it down, in large part because (especially in light of that country's recent experience with an all-too-close relationship between the party and the state) public financing promoted excessive entanglement between the state and what were supposed to be competing private groups. See Casper, *Williams v. Rhodes and Public Financing of Political Parties Under the American and German Constitutions*, 1969 Sup. Ct. Rev. 271, 296.[62]

[62] The German Constitutional Court later reversed itself when confronted with a different law, although it struck down rules that disallowed financing to the smaller parties.

Of course, in the United States, unlike the case in Germany, political parties have not been established or recognized by the Constitution itself. It is therefore not possible to make an "establishment clause" argument in the same sense that one could make an "establishment clause" argument if the federal government were directly to provide financing only to "major" religions. On the other hand, established parties are supported by FECA to the exclusion of new or struggling parties, thereby further "establishing" such groups. FECA might be thought to create the potential for "established" groups to drown out their competitors; the "established" groups may be obnoxious to adherents to other philosophies; the "established" groups may, in time, become entangled with their patron, and either modify, or be forced to modify, the philosophy that originally drew them together. Cf. *Speiser* v. *Randall*, 357 U.S. 513.

In evaluating this potential the Court, of course, must determine how likely these events are and whether, if they did occur, a judicial remedy at that time would offer a solution.

C. Discrimination Against Small Parties.

This Court has held on numerous occasions that state laws affording established parties automatic access to the ballot, while hindering the access of small parties, can be upheld only if the difference is justified by a compelling state interest. See, *e.g.*, *Lubin* v. *Panish*, *supra*; *American Party of Texas*

v. *White*, 415 U.S. 767. Although there are many legitimate governmental interests involved in the political process, some of them compelling, the government must pursue its legitimate interests "by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity" (*Lubin* v. *Panish*, *supra*, 415 U.S. at 716). The court of appeals correctly recognized that "provisions for public funding of Presidential campaigns, like provisions regulating access to the ballot, could operate to give an unfair advantage to established parties, thus reducing, to the nation's detriment, * * * the 'potential fluidity of American political life.' *Jenness* v. *Fortson*, 403 U.S. 431, 439 (1971)" (J.S. App. 1562). Although the court of appeals held that FECA is not unconstitutionally discriminatory, Judges Tamm and Wilkey disagreed (J.S. App. 1604-1607).

The Act divides parties into three classes: "major", "minor", and "new". New parties are not entitled to any funds unless they gather more than five percent of the votes in an election, in which event funds are provided *after* the election. Minor parties receive funding based upon their success at the previous election, and the funds provided may be augmented after the election should the minor party be more successful than it was previously. Major parties (all parties gathering more than 25 percent of the vote), by contrast, are treated alike, even though they may be quite different in percentage of the vote gathered. They receive $20 million *prior* to the election.

Three sorts of discrimination might be thought to arise out of this scheme: minor and new parties (and especially those parties formed since the last election) are relatively disadvantaged in comparison to major parties; the distinction between minor parties (which are entitled to proportional funding) and new parties (which get none until after an election) may be defective; and minor and new parties may be caught between the inadequacy of their funding and the limit on contributions.

No one questions that Congress has the power to limit the class of candidates to whom it will furnish financial support; it is important to be sure that the candidates are serious or bona fide before allowing them access to public funds, just as a State can condition ballot access upon a reasonable demonstration of popular support. Congress has an interest—indeed, a compelling interest—in requiring parties and candidates to demonstrate support before throwing open the public coffers. Cf. *Bullock* v. *Carter*, 405 U.S. 134, 145. In recent and analogous cases, the Court has held that States may impose qualification requirements for access to the ballot, and that these requirements upon occasion serve a compelling state interest. See, *e.g.*, *Lubin* v. *Panish*, *supra*; *Storer* v. *Brown*, *supra*; *American Party of Texas* v. *White*, *supra*; *Jenness* v. *Fortson*, 403 U.S. 431. Although under these cases reasonable and necessary qualifications standards are permissible, the qualifica-

tion standards cannot discriminate against smaller parties and cannot unjustifiably inhibit ballot access.

The financing provisions of the Act, when combined with the contribution limits, may seem to place smaller parties at a considerable disadvantage. Parties that have not in the past obtained five percent of the vote receive no funds at all; their opponents in the same election may be generously supported by public funds. Unlike the case in *Storer* and *American Party*, the Act provides no alternative methods of qualification that give smaller parties a realistic opportunity of effective participation (in pre-election funding). No quantity of signiatures on petions, no objective showing of support, will enable a small party to claim any share of the public funding until after the election. Lack of alternative means of access to the ballot was condemned in *Lubin*, and the availability of alternatives relied upon in *Storer* and *American Party*. The issue is whether the lack of alternative means for a small party to demonstrate its popular appeal prior to the election is constitutionally defective here.

Candidates in presidential primaries—like minor and new parties in the general election—may have no track record in previous primaries, or (because those primaries occurred four years previously) the track record may not reflect current support. Congress provided for a program of matching funds. Public support is closely linked to the candidate's ability to procure private support, subject to a "trigger" device designed to ensure that the candidate has enough support to be serious. See 26 U.S.C. 9033.

Could this or some similar device—which would obviate some of the claims of discrimination against small parties—be used for general elections as well? [63] The court of appeals found it an "eligible alternative," but thought it "cumbersome" (J.S. App. 1564). Cf. *Lubin* v. *Panish*, *supra*, 415 U.S. at 718.

In considering the lack of alternative means of qualifying for pre-election funds, the Court should take into account that FECA's contribution limits apply to major, minor and new parties, which to some extent limits the ability of new and minor parties to compete by raising funds from large contributors.[64]

Although it should be apparent that Congress can demand some showing of substantial support before providing public funds, another question arises—whether five percent of the actual vote, which new parties must gather to be eligible, is excessive. It

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[63] As the court of appeals stated, other trigger devices—such as opinion polls and petition signatures—probably are not feasible. See J.S. App. 1563-1564.

[64] If the contribution limits are themselves unconstitutional, this point would not apply.

In addition, the Court might consider the argument that the position of smaller parties is relatively improved vis-a-vis major parties because, although smaller parties must continue to raise funds privately, the major parties cannot spend in excess of $20 million, so that the ratio of small party expenditures to major party expenditures will increase. However, this argument would fail if the expenditure ceiling is unconstitutional. Moreover, because major parties are relieved from the onerous burden of fund raising, they may gain in other advantages whatever benefits they lose in relative financial power.

is not entirely accurate to analogize the minimum showing of support necessary to receive public funds, on the one hand, to the showing of support necessary to be placed on the ballot, on the other. A candidate, once on the ballot, has some chance of prevailing even if not entitled to public funds. And in *Jenness* v. *Fortson*, *supra*, the Court upheld a ballot qualification law compelling a potential candidate to obtain the signatures of five percent of the electorate.

In *Storer*, *supra*, the Court was again confronted with a five percent qualification rule, but in *Storer*, unlike in *Jenness*, the five percent was required to be obtained from among those who had not voted for other candidates. As between *Jenness* and *Storer*, FECA appears to fall on the *Storer* side: because each voter casting a ballot in a presidential election can vote but once, the candidate of a smaller party must obtain his five percent from among those who have declined to vote for the candidate of a major party. Cf. *American Party*, *supra*, 415 U.S. at 782-784.

It is, of course, for Congress to decide what to adopt as a compromise among the interests of the major and minor parties, taking into account the need for reasonable administrative feasibility and the interest in protecting the Treasury against raids by candidates without prospect of success. If more than one solution is constitutionally acceptable, the choice of Congress must be respected. The degree of deference due to Congress in this regard may well be

decisive when the Court evaluates the constitutionality of these FECA provisions.

V. THE SCOPE OF THE COMMISSION'S POWER.[65]

The Federal Election Commission is composed of six voting members (2 U.S.C. 437c). Two members are appointed by the President, two by the Speaker of the House (upon recommendations of the Majority Leader and Minority Leader), and two by the President Pro Tempore of the Senate (upon recommendations of the Majority Leader and Minority Leader). All six voting members, who serve staggered six-year terms, must be confirmed by majority vote of both Houses of Congress.

The Commission has been given broad powers to administer the provisions of FECA. It has the power to conduct investigations and make findings of fact; it can subpoena information it deems necessary for that purpose (2 U.S.C. 437d(a)(1) through (5), (11)). The Commission has the power to formulate and promulgate rules, pursuant to the provisions of the Administrative Procedure Act (2 U.S.C. 437d (a)(8) and (9); 2 U.S.C. 438). It can render advisory opinions, and any person who acts in accordance therewith "shall be presumed to be in compliance with" the provisions of FECA (2 U.S.C. 437d (a)(7), 437f). It has discretion to audit the records of candidates or political committees in order to detect violations of FECA or simply to gather informa-

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[65] The Attorney General joins in this section of this brief as a party. See out Statement of Interest at page 2, *supra*.

tion (2 U.S.C. 438(a)(8)). And, when necessary, the Commission can make exceptions to certain of FECA's substantive provisions (see, *e.g.*, 26 U.S.C. 9008(d)(3)).

The Commission also possesses apparently broad powers to seek enforcement of the provisions of FECA and to penalize those who do not comply with its provisions. The Commission can, in its own right, impose sanctions; a candidate who fails to file required reports can be disqualified for a period of one year from seeking office (2 U.S.C. 456). The Commission's powers do not stop with entering administrative penalties that are judicially reviewable, for the Commission also is authorized to seek judicial relief for violations of FECA. It can receive complaints (2 U.S.C. 437g(a)), and, after investigation, institute civil proceedings in its own name or on behalf of the United States, seeking injunctive or other civil relief (2 U.S.C. 437d(a)(6), 437g(a)(5); 26 U.S.C. 9010, 9011(b)(1), 9040). "The Commission has primary jurisdiction with respect to the civil enforcement" (2 U.S.C. 437c(b)) of many parts of FECA. Instead of bringing its own civil action, the Commission can direct the Attorney General, who "shall" comply, to bring a civil action (2 U.S.C. 437 g(a)(7)). Only when criminal prosecution is contemplated does the Commission's enforcement power cease (2 U.S.C. 437g(a)(6)); the Attorney General has authority to prosecute criminal cases.

Although the Commission therefore appears to possess both substantial administrative authority and

plenary civil enforcement authority, much of its activity is under the direct control of the Congress. Two Officers of Congress are *ex officio* members. Not only are four of its six voting members appointed by Congress, but also all rules proposed to be made by the Commission must be submitted to Congress (2 U.S.C. 438(c)), which can "veto" the rules if either chamber disapproves them within thirty legislative days of transmission. The Commission also must submit all of its proposed budgets and drafts of proposed legislation to Congress before submitting them to any other federal agency or person in the executive branch.

In sum, the Commission is dominated by Congress—so much so that we thing it fair to say that it is an arm of Congress, or a legislative agency, in much the same manner that the General Accounting Office is a legislative agency. Its composition, together with its powers, therefore raises unprecedented constitutional questions of the first magnitude. Can a body, so constituted, exist under our Constitution? By what authority are its members appointed, if not the authority provided in Article II, which allows the President to appoint Officers of the United States by and with the consent of the Senate, and which allows the courts and executive officers to appoint "inferior" officers without Senate confirmation? Four members of the Commission are appointed by Congress itself; all six members are confirmed by the House in addition to the Senate. By what grant of power can a single house of Congress "veto" the rules proposed by an administrative agency? The

Constitution provides that laws are made with the concurrence of the Congress and the President, unless two-thirds of both houses of Congress override the President's veto. Can an agency subservient to Congress make "legislative" rules? Can such an agency possess law enforcement power, when executive authority is reserved to another branch by Title II?

These questions about the composition and duties of the Commission concern the allocation of power in our form of government, an allocation reached through some of the most basic compromises of the Constitutional Convention. Thus, far more is at stake than the particular composition and powers of the Commission; if the Commission constitutionally can exercise the powers bestowed upon it, it may set the example for other agencies yet to be created and the pattern for a process that will work a fundamental alteration in the separation of functions and system of checks and balances between branches of government that the framers believed critical to the success of this republic.

We submit that the Constitution permits the Commission to exist, but that it exists as a legislative agency, as an arm of Congress. As an arm of Congress, it can exercise whatever functions Congress desires to delegate to it. But Congress can delegate to one of its agencies no more power than Congress itself possesses, and Congress cannot enforce the laws, or make laws without the participation of the President. We expand upon these arguments below; before we address them, we explain why we agree

with the court of appeals that it is not yet necessary to decide the issues.

A. This Court Should Not Decide The Central Questions Concerning The Power And Duties Of The Commission.

We agree with the court of appeals' decision not to decide the central issues presented by the existence of the Commission and the scope of its power. Issues of such import should not be adjudicated other than in more concrete circumstances, in which all parties concerned will have adequate opportunity to study specific questions and present them for the Court's consideration free of the pressure of time and weight of other matters that accompany this litigation. The allocation of powers to the Commission does not, at least for the time being, affect the obligations of appellants. They are not more inhibited because one body rather than another will enforce FECA. Challenges to the authority of the enforcing agency can await resolution in circumstances more conducive to judicial contemplation and consideration.

The court of appeals decided that most of the questions plaintiffs present are not ripe for adjudication, finding that (J.S. App. 1576):

> Whether particular powers are predominantly executive or judicial, or insufficiently related to the exercise of appropriate legislative power is an abstract question that would be better decided in the context of a particular factual controversy.

This case is lacking in the particularity necessary to enable a court to perform its function of judicial review. Although it may eventually become clear that Congress and the Commission are attempting to exercise powers reserved to the executive, we cannot be sure that this will happen. The Commission has not exercised, or threatened to exercise, any law enforcement powers, representing that it would refer civil enforcement cases to the Attorney General, except in cases in which the Commission merely is attempting to enforce its right to investigate.[66]

We submit that the case is not made ripe merely because the Commission has the potential to exercise reserved executive functions. Should that potential become reality there will be time enough to adjudicate the matter.[67] So long as the Attorney General exer-

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[66] Congress has the right to enforce its own subpoenas and, if the Commission is an arm of Congress, we see no constitutional bar to possession of such power by the Commission. Cf. *In re Chapman*, 166 U.S. 661; *United States* v. *Bryan*, 339 U.S. 323; *Watkins* v. *United States*, 354 U.S. 178, 206-207. Similarly, the Commission may confine the exercise of its rulemaking power to the establishment of internal rules not binding on the executive.

[67] The Attorney General can bring an action in the nature of *quo warranto* to test the right of the Commission to perform the duties FECA has assigned to it. See *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479; *Newman* v. *United States ex rel. Frizzell*, 238 U.S. 537. Such a proceeding would enable the United States and the Commission to proceed, as adversaries, to litigate the central questions of the Commission's authority. The dispute would then squarely be resolved between the major interested parties.

Alternatively, a defendant in a suit prosecuted by the Commission may be able to defend by asserting the lack of the

cises concurrent jurisdiction in civil cases and complete jurisdiction in criminal cases, as the Commission concedes, plaintiffs suffer no additional deterrent or inhibitory effect because one rather than the other of these potential enforcers may take action.

Should the Court disagree with our argument that the court of appeals properly postponed decision on most questions concerning the Commission's authority, we believe that the proper course would be to vacate this part of the judgment of the court of appeals and to remand, to give the court of appeals an opportunity to consider these questions in the first instance. However, out of an abundance of caution, we briefly set out the elements of our position with respect to the Commission's powers. (Be-

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Commission's authority (cf. *Glidden* v. *Zdanok*, 370 U.S. 530; *Palmore* v. *United States*, 411 U.S. 389) or a candidate seeking to block enforcement of a Commission order disqualifying him, or a petitioner seeking review of rules made by the Commission, may have a similar opportunity to litigate. Whether challenges would be permissible in such suits is, however, doubtful in view of the fact that violations of the separation of powers usually must be redressed by the government itself, not by ordinary citizens (*Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208) and that the "*de facto* officer doctrine," long adhered to by this Court, precludes a private challenge to the acts of a federal official on the basis that he is not a proper officer. See, *e.g.*, *McDowell* v. *United States*, 159 U.S. 596, 601; *In re Manning*, 139 U.S. 504, 506.

The powers of the Commission also might be adjudicated in a criminal prosecution or civil action brought by the United States against an individual who interposes as a defense reliance on an advisory opinion by the Commission. See pp. 112-113, n.71, *infra*. In such a case, of course, the defendant would be seeking to support, rather than oppose, the Commission's powers.

cause we believe that the following discussion is superfluous, we present it without the fullness of argument that the subject deserves.)

B. The Commission Is An Arm Of Congress Because Its Members Are Appointed By Congress And Its Regulations Are Subject To Congressional Control.

It appears to be common ground among the parties and the court of appeals (J.S. App. 1573) that the Commission is an arm of Congress, a "legislative agency," and this is scarcely open to doubt.[68]

While plaintiffs contend that the method of appointment of the Commission's members does not conform with Article II, Section 2, clause 2 of the Constitution, that lack of conformity simply demonstrates

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[68] Four of the Commission's six voting members are appointed by the Houses of Congress; the Commission's *ex officio* members are the Secretary of the Senate and the Clerk of the House; all six of the Commission's voting members must be confirmed by both Houses of Congress; all rules proposed by the Commission can be disapproved by either House of Congress; the Commission must submit proposed legislation to Congress before circulating it to any other agency or executive officer; the Commission must submit its budget requests directly to Congress at the same time as it submits its requests to the Office of Management and Budget. These indicia properly led the court of appeals to accept the Commission's concession and to conclude that the Commission is an arm of Congress under the active influence, if not the day to day control, of Congress. This conclusion is, as the Commission argued in the court of appeals, fortified by the fact that many of the Commission's duties relate to powers—such as Congress' power to judge elections and the qualifications of its members—that Congress can exercise free of control by the executive branch.

that the members of the Commission are neither "other Officers of the United States" nor "inferior Officers." But there is no reason why members of a legislative agency must be "Officers" as Article II uses that term.[69]

In any event, under the Necessary and Proper Clause, Article I, Section 8, clause 18, Congress is entitled to have the aid of others in the performance of its legislative duties and it is necessary and proper for Congress to appoint the persons to provide that assistance.

Plaintiffs also have argued that the "legislative veto" provided for in Section 438(c) is unconstitutional. Whatever constitutional issues might be posed were this a provision for a one-house legislative veto of action by the executive branch,[70] the

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[69] The Constitution expressly grants to Congress the right to appoint its own officers. Article I, Section 2, clause 5 provides that "The House of Representatives shall chuse their Speaker and other Officers; * * *." Article I, Section 3, clause 5 extends similar power to the Senate. The members of the Commission, an arm of Congress, reasonably can be viewed as officers of the bodies that appointed them. Although Congress has provided that the nominees of the House must be confirmed by the Senate, and vice versa, we think they could do so with any of their other officers.

[70] There has been much scholarly debate over the constitutionality of the legislative veto and similar devices for congressional control of executive action. The most recent and thorough study concludes that such devices are often an unconstitutional intrusion into executive authority. Watson, *Congress Steps Out: A Look at Congressional Control of the Executive,* 63 Calif. L. Rev. 983 (1975). See also Ginnane, *The Control of Federal Administration by Congressional*

Commission is an arm of Congress, so that the "legislative veto" established by Section 438(c) is simply one means by which Congress controls its own instrumentality. It is not an attempt by Congress to control the executive branch or an executive officer, nor is it a method by which Congress or the Commission can change the law without presidential participation.

As we see the problem, then, it is not so much a question whether the composition and decisionmaking structure of the Commission are defective, as it is the question what a commission, so constituted and functioning, is permitted by the Constitution to do.

C. The Commission Can Perform Only Those Functions That Congress Or One Of Its Committees Or Employees Could Perform.

In order to minimize the possibility of confusion, we set forth in the margin the Commission's powers we do *not* challenge.[71] The powers of the Commission

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Resolutions and Committees, 66 Harv. L. Rev. 569 (1953); Newman & Keaton, *Congress and the Faithful Execution of the Laws—Should Legislators Supervise Administrators?,* 41 Calif. L. Rev. 565 (1953); Schwartz, *Legislative Control of Administrative Rules and Regulations,* 30 N.Y.U. L. Rev. 1031 (1955); Cooper, *The Legislative Veto and the Constitution,* 30 Geo. Wash. L. Rev. 467 (1962); Jackson, *A Presidential Legal Opinion,* 66 Harv. L. Rev. 1353 (1953).

[71] Congress has substantial powers to investigate and issue subpoenas in order to collect and evaluate information necessary to enable it to make laws. See *Eastland* v. *United States Servicemen's Fund,* No. 73-1923, decided May 27, 1975. Just as a committee of Congress can investigate, issue subpoenas, report to Congress on its findings, and refer to the proper

that are, in our view, unconstitutional infringements of the exclusive power of the President faithfully to execute the laws or of his constitutionally assigned role in the law-making process are the power to seek civil sanctions for violation of FECA, the power to disqualify candidates, and the power to promulgate rules binding upon the executive and the courts.

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authorities any apparent violations of the law, so Congress can authorize its legislative agency to perform similar functions. Congress can authorize its staff to discuss and propose legislation for consideration by it; the Commission's power to do likewise is not open to challenge. Congress can authorize its staff members to inform it of their view of the meaning of legislation it has passed, and to make those views public. Similarly, the power of the Commission to issue advisory opinions is simply a power to announce an opinion on the meaning of a law; it is not a power to alter or amend the law, or to enforce the law (see J.S. App. 1579).

We would have greater pause if the Commission's advisory opinions were binding upon the courts or upon those properly charged with prosecuting violations of FECA. The pertinent provision, 2 U.S.C. 437f(b), states that a person who "acts in good faith in accordance with the provisions and findings of [a Commission] advisory opinion shall be presumed to be in compliance with the provision of this act." If this means that the Commission can confer immunity from prosecution, then it raises serious questions; if it means only that the advisory opinion establishes a presumption in favor of the interpretation of the law set out in it, the problems are less serious, for such presumptions can be rebutted, and the advisory opinions will not bind the coordinate branches of the government. The court of appeals held the question not ripe for resolution, and we think correctly so. "When a person who relied in good faith on an advisory opinion seeks to assert that good faith reliance as a defense to a civil suit or a criminal prosecution, the issue of the effect to be given to an advisory opinion can be raised and fully considered by the courts" (J.S. App. 1579).

1. *The Constitution separates the executive function from the legislative function, reposing each in a separate body.*

Congress, no doubt, was apprehensive when it enacted FECA that the President and Attorney General would not enforce the law in the same way Congress would have enforced it in their stead, and therefore decided to provide the opportunity for executing the law itself. But this tension between departments of the government, and the consequent belief of one department that it would be wiser for it to undertake all of the functions itself, is not a "flaw" in the constitutional system but rather is its genius. See *O'Donoghue* v. *United States*, 289 U.S. 516, 530; *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406.

Each branch of the government is charged by the Constitution with the task of preserving its own powers, lest the design of the framers be frustrated. Although the framers concluded that the broadly-representative Congress should possess the power to make the laws, they gave to the President two sorts of check upon Congress: the power to veto bills passed by Congress, and the power to execute the laws (Art. II, Section 3 of the Constitution). And they did so because, as Montesquieu wrote in his *Spirit of the Laws* (1748):

> When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty, because apprehensions may arise, lest the same monarch or

> senate should enact tyrannical laws, to execute them in a tyrannical manner.

In contending that the Commission cannot exercise executive powers, we do not suppose that it would exercise its statutory powers unwisely. But that is not the point. In the long run the Commission and other entities like it, if they assume executive branch functions, could seriously deform the structure of government established by the framers and upset the separation of functions and the allocation of checks and balances.[72] The framers "rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 593 (Frankfurter, J., concurring). The system is that stated by the Court in *Massachusetts* v. *Mellon*, 262 U.S. 447, 488:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought

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[72] The separation of powers works on a principal of frustration of power. It presumes "an organization which may delay the accomplishment by any group of its will, even at the expense of efficiency. Against the unprecedented power of relatively popular legislatures the Fathers set strong executives * * *." Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. Chi. L. Rev. 385, 386 (1935).

before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other.

2. Law enforcement and interpretive rulemaking are functions assigned to the executive branch.

The Commission has been assigned the power to institute and defend civil suits in its own name and in the name of the United States and to issue rules interpreting FECA, which presumably will bind the Commission and any other agency that enforces FECA. It has also been given an administrative power to disqualify candidates for office, subject to judicial review. Each of these powers is subsumed in the power and duty faithfully to execute the laws; each is part of the power reserved to the executive by Article II of the Constitution.

A long series of cases decided by this Court establishes that the power to enforce the laws in the courts—whether civil or criminal—is an executive power.[73] In *Quinn* v. *United States*, 349 U.S. 155,

[73] The first of these is *The Confiscation Cases*, 7 Wall. 454. The Attorney General brought libels to confiscate several privateers; an informer was entitled, by statute, to one-half of the recovery. When the Attorney General moved to dismiss the cases, the informer objected. The Court rejected the informer's claims, holding that the "[s]ettled rule is that * * * courts will not recognize any suit, civil or criminal * * * if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney" (*id.* at 457). The Court concluded that the Attorney General has full control over all federal litigation (*id.* at 458-459).

the Court, while acknowledging that Congress has the power to investigate events that may be crimes, cautioned: "the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary" (349 U.S. at 161). See also *United States* v. *Thompson*, 251 U.S. 407.[74]

We think it clear, then, that attempts to enforce the law in the courts are at the heart of the executive's exclusive power faithfully to enforce the laws; these actions are beyond the control of Congress, and likewise beyond the control of its surrogate, the Commission. Interpretive rulemaking also falls within the executive's prerogative or, depending on the nature and function of the rules (which in this case cannot now be determined), is part of the legislative process from which the executive cannot properly be excluded. In regard to the power to make initial determinations that a particular candidate shall be disqualified, whoever has the power to make that initial determination is exercising the power to de-

In *Ponzi* v. *Fessenden*, 258 U.S. 254, 262, the Court described the Attorney General as "the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offences, be faithfully executed."

[74] *United States* v. *Cox*, 342 F.2d 167 (C.A. 5) (*en banc*), certiorari denied, 381 U.S. 935, held explicitly that the power of prosecution belongs solely to the executive branch, and that neither Congress nor the courts can interfere with it in any particular.

termine how the laws shall be applied and carried out. It is an executive function, similar to the decision of a prosecutor to seek an indictment.[75]

In the court of appeals the Commission conceded as much, but argued that the Commission is simply exercising the "quasi-executive" and "quasi-judicial" powers reserved to Congress by Article I. This argument turns on an analysis of the subject matter of the Commission's jurisdiction; the Commission agrees that it could not constitutionally enforce, say, the antitrust laws, but contends that it can enforce FECA because Congress has broader powers over the subject matter of elections and election campaigns. This approach fails to distinguish between the two sorts of power over elections entrusted to Congress.

The first, which is unique to Congress' jurisdiction over elections, gives each House of Congress the power to judge the qualifications of its members, including the validity of elections. So long as Congress excludes a member-elect for failure to meet constitutional qualifications, or because he was not properly elected, it can exercise its power without the approval of either the judicial or executive branches. *Powell* v. *McCormack*, 395 U.S. 486. To the extent Congress has delegated part of that power to the Commission, the Commission acts free of executive interference.

[75] This would be a different matter if the Commission had final authority over disqualification, but it does not. It can make only the initial decision to disqualify, and judicial review follows, just as the judiciary reviews the actions of executive officers or of other quasi-executive agencies.

The Commission is not accurate, however, in characterizing Congress' remaining power over elections as other than ordinary legislative power. That power is the power to make laws with respect to elections and is no broader than its power to make laws with respect to the common defense, the issuance of coin and currency, or the regulation of commerce. The power to make laws with respect to these subjects—and many more—is textually committed to Congress. But what is textually committed is the power to *make* laws, not the power to *enforce* them, and an especially broad subject-matter grant of law-making power does not lead to any conclusion about the scope of Congress' law enforcement power. To argue, as the Commission apparently does, that because Congress has both broad law-making power and a special interest in the subject matter of elections, it *therefore* possesses some manner of law-enforcement power, is a simple *non-sequitur*.

3. *The Commission, acting as an arm of Congress, has no greater authority than does Congress to enforce the laws Congress has made.*

If Congress itself cannot execute the laws, or make rules binding on those who execute the laws, then it cannot deputize a legislative agency to exercise such powers in its stead.[76] Congress cannot bestow

[76] Congress can, of course, make "rules" binding on the executive. But it can make such rules only in the form of law, over which the President has the power of veto. The "rules" made by the Commission are not subject to Presidential veto, and its rules therefore cannot be analogized to laws.

upon its subordinates powers it does not possess. "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint agents charged with the duty of such enforcement. The latter are executive functions" "[I]t may be stated * * * as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise * * * executive * * * power * * *." *Springer* v. *Philippine Islands*, 277 U.S. 189, 201, 202.

Springer is the paradigm for Congress' creation of the Commission. Congress, which itself lacks the power to enforce the laws, has attempted to "appoint the agents charged with the duty of such enforcement" (*id.* at 202). It is not entitled to do so.[77]

In sum, law enforcement and interpretation are integral parts of the executive power to execute the laws. Congress is entitled to legislate but not to execute the laws, and Congress has no power to appoint others to execute the laws when Congress cannot do so itself. It follows that the Commission cannot exercise the three executive powers granted to it by FECA.[78]

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[77] See also *Washington* v. *Clark*, 84 F. Supp. 964, 966 (D.D.C.).

[78] Intervening defendant Common Cause filed a separate brief in the court of appeals addressed to the question of the Commission's powers. In supporting the constitutionality of FECA's provisions, Common Cause drew upon two analogies —suits by private attorneys general and suits by independent regulatory agencies—to demonstrate that the powers entrusted to the Commission are constitutional. These analogies do not support Common Cause's argument.

Private citizens can be plaintiffs in *qui tam* actions and sometimes can act as "private attorneys general." But it is one thing to allow private individuals to share a right of suit enjoyed by the executive, and quite another for Congress to take the right of enforcement to itself. It is still a third thing for Congress both to exclude the executive and to include itself in the business of enforcement. The first is no precedent for the third. The separation of powers and checks and balances built into our Constitution establish the method by which two inherently antagonistic centers of power share in the governance of the country. These delicate sharings and checks upon power are not disturbed by private suits. They are disturbed, to a considerable degree, if Congress appropriates to itself a power the Constitution places in a coordinate branch.

As to the analogy to independent regulatory agencies, the argument ignores a decisive difference: the members of the independent regulatory commissions are "Officers of the United States" within the meaning of Article II, Section 2 of the Constitution. They are appointed by the President and are confirmed by the Senate. In consequence, they can share, much as cabinet officers share, in the power granted by Article II to execute the laws. Members of the Commission are not "Officers of the United States" and, in consequence, possess no power under Article II.

CONCLUSION

The position of the Attorney General as a party to this case, and of the United States, is that the court of appeals' judgment with respect to certified question 8 should be affirmed. The United States as

amicus curiae takes no position with respect to the remaining portions of the court of appeals' judgment.

Respectfully submitted.

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